3

The Status of Odious Debts in International Law

It was argued in chapter 2 that it is helpful to conceive of legal authority for the doctrine of odious debt as falling within four different categories: war debts, subjugation debts, illegal occupation debts and corruption debts. The present chapter examines the legal support found in international law for the claim that such odious debts do not bind states under international law. It will further clarify why these types ought to be viewed as distinct from one another.

Article 38(1) of the Statute of the International Court of Justice (ICJ) is an important enumeration of the key sources of international law.[1]

> **Article 38**
>
> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The proof of customary international law depends upon the establishment of (a) uniformity and consistency of state practice, (b) generality of state practice and (c) *opinio juris*.[2] 'Uniformity' refers to consistent usage between the relevant states, or absence of fluctuation and change in practice with regard to the norm alleged to be law.[3] 'Generality' refers to the acceptance of the norm by a substantial number of relevant states,

[1] J Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford: Oxford University Press, 2012), p. 22 (expressing tentative approval).

[2] Ibid., pp. 24–27. [3] *Fisheries Case*, (1951) ICJ Reports 116, 180.

and *opinio juris* is the belief of states that the practice is in some way obligatory *as law*, rather than expedient usage.

Some commentators assume that a claim concerning the legal status of the odious debt doctrine must meet with uniform, general agreement between states before being legally cognisable.[4] These views approach the issue from the wrong direction, however. If it required unanimity and consistency, why is there an expanding majority opinion among scholars of state succession that odious debts are not binding on a successor state?[5] The view that uniform agreement must obtain on the existence of a doctrine of odious debt has no way of accounting for that embarrassing fact. It rather appears that where the rules are unsettled, or there has been a substantial variation in state practice, or otherwise substantial legal disagreement (whether between tribunals or the most qualified publicists), it follows logically that the claimant asserting the existence of the rule has the burden of proving not only that the rule applies generally but also in the case of the alleged exception. Where, by contrast, the rules are settled and agreement is nearly universal, then any person raising an exception to the rule as a defence – at least in international law – would carry the burden of showing that the exception meets the criteria associated with proving international custom. Although most assume the contrary, I have shown in chapter 2, section II that the alleged rules of repayment in international law (at least in relation so the succession of states) have uncertain legal foundations and complex intricacies. On the other hand, it is certainly true that domestic law affords a much more certain basis for a creditor's claim. In such cases, which are now dominant, any alleged right to avoid an odious debt to be derived from international law and used to displace application of the usual domestic rules would indeed need to meet with the onerous burden of justification associated with international custom (and even then it might be overlooked by a national court). This conclusion, nevertheless, has no great significance for the remaining positions advanced in this book, so we may proceed directly to examining the sources of law.[6]

[4] A Gelpern, 'Odious, Not Debt' (2007) 70 *Law & Contemporary Problems* 81, 85; A Yianni and D Tinkler, 'Is There a Recognized Legal Doctrine of Odious Debts?'(2007) 32 *North Carolina J of Int'l L and Comm Reg* 749, 766 ('These arguments must be able to discharge the burdens described by the ICJ necessary to become a customary rule of international law.'); LC Buchheit and GM Gulati, 'Odious Debts and Nation Building: When the Incubus Departs' (2008) 60 *Maine L Rev* 477, 482 (saying precedents are 'astonishingly meager').

[5] See above, chapter 2, section II.

[6] The basis advanced below for avoiding an odious debt under domestic law is *domestic* public policy, informed by international law but not a direct transposition thereof.

I. War Debts

War debts have traditionally been defined as debts arising out of transactions which helped or are presumed to have helped the defeated country in waging or preparing war against the successor state or its allies.[7] War debts are anomalous as odious debts because they are not related to the benefit received by the local population. Indeed, one can be forgiven for wondering why they are discussed as odious debts at all. The answer is that it is a matter of legal history that explains if not justifies this categorisation. The term 'odious' has been used historically to describe this debt because it falls within a category of debt claims that successor governments refuse to recognise for moral and political reasons. I suggest below that loans which fund wars that are illegal under international law can also be regarded as unenforceable in international law.

A. Practice and Treaties

There is no multilateral treaty that addresses whether war debts are enforceable against a successor state. Yet there are many examples of state practice refusing to assume war debts. An illustrative list of precedents and treaties exhibiting such practice is helpful[8]:

- Article 4, Peace Treaty of Campo Formio, 17 October 1797, between France and the Emperor of the Holy German Empire;
- Article 24, Franco-Prussian Peace Treaty of Tilsit of 9 July 1807 (only exempting the allocation of war debts contracted during the war);

Furthermore, subjugation debts are in this chapter defined by reference to norms whose position in international law is now firmly cemented, though clearly not so at the time Sack wrote. The remaining types of odious debts meet the applicable thresholds for customary if not treaty-based international law.

[7] HJ Cahn, 'The Responsibility of the Successor State for War Debts' (1950) 44 *AJIL* 477; see also M Bedjaoui, *Ninth Report on Succession of States in Respect of Matters Other Than Treaties*, UN Doc A/CN 4/301 & Add 1, reprinted [1977] 2 *Y B Int'l L Comm'n* Pt I, 45, 70–72, ('any debt contracted by the predecessor state to sustain its war effort against the [successor state]'); AN Sack, *Les effets des transformations des États sur leur dettes publiques et autres obligations financières*, (Paris: Recueil Sirey, 1927), p. 165ff; E Feilchenfeld, *Public Debts and State Succession* (New York: Macmillan, 1931), pp. 269, 450–453, 719; TH Cheng, 'Renegotiating the Odious Debt Doctrine' (2007) 70 *Law & Contemporary Problems* 7 departs from the traditional definition by suggesting that Iraq's debts in 2003 could be regarded as war debts. Iraq's debts were incurred fighting countries other than the United States, and the United States was not a successor state to Iraq.

[8] All examples are canvassed in Cahn, 'The Responsibility of the Successor State', unless cited to a different source.

- Article VII of Final Peace Treaty of Vienna of 1864 (between Denmark on one side, and Prussia and Austria on the other);
- English refusal to pay war-related debt of the South African Republic upon annexation in 1900[9];
- Article 254, Treaty of Versailles of 28 June 1919 (concerning liability of ceded former German territories for Germany's wartime debt);
- Article 203, Treaty of Saint Germain of 10 September 1919 (concerning successor state liability for war debts of Austria and Hungary after 28 July 1914);
- Article 50 (1), Treaty of Lausanne of 24 July 1923 (concerning the Balkan War cessionaries);
- Annex X, subparagraph 5, Italian Treaty of the Peace Treaties of Paris of 10 February 1947 (concerning the succession of war debts to Italy).

One instance is sufficiently important to warrant closer examination. Great Britain invaded the Transvaal Republics in 1899, conquering and annexing them in 1900. It refused to repay debts incurred by the Boer Republics in order to try to repel the British military conquest. In *Postmaster General v Taute*,[10] the Supreme Court of the Transvaal declared that the Boer debts had devolved upon Britain, who as the new sovereign was responsible for all of the territory's outstanding debts. The British government refused to accept this claim with respect to public debts. In the case of war debts, the British position was very similar to that of the United States in the Cuban Debt controversy:[11] 'The British Government denied all legal responsibility for such "odious" debt, denied the Republic's capacity to have issued such debt validly, and announced that the British Government would not honour the bonds upon presentation.'[12] The British government later did pay, ex gratia, 10 per cent of the value of the bonds. Bondholders ultimately sued and lost in English courts. The *West Rand Central Gold Mining Company* case definitively rejected any liability for war debts, and refused to find more generally that it was appropriate for an English court to decide which of a country's former debts a conqueror should acquire.[13]

[9] M Hoeflich 'Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession' (1982) *U Illinois L Rev* 39, 59; Feilchenfeld, *Public Debts and State Succession*, p. 312; *West Rand Central Gold Mining Company, Limited v The King* [1905] 2 KB 391.

[10] [1905] TS 582 (Sup Ct 1905).

[11] And acknowledged as so by Hoeflich, 'Through a Glass Darkly', 59.

[12] Hoeflich, 'Through a Glass Darkly', 59; Feilchenfeld, *Public Debts and State Succession*, pp. 380–381.

[13] *West Rand Central Gold Mining Company The King*.

Though some have accused Britain of acting opportunistically, and that AB Keith was an apologist for that behaviour, Hoeflich notes that Britain adopted this same position even when it was adverse to the interests of its own citizens.[14]

War debts were again exempted more recently, in Article 5, subparagraph 1, of the Algiers Peace Agreement between Eritrea and Ethiopia, 12 December 2000.[15] The treaty excluded from the remit of an appointed claims commission those debts and claims that were related to the 'cost of military operations, preparing for military operations, or the use of force', unless the claims related to violations of international humanitarian law. These examples suffice to demonstrate that there has been a wide fluctuation in state practice regarding the payment of war debts, such that there appears to be no widely observed rule requiring their repayment.

B. Opinions of Writers and General Principles of Law

HJ Cahn felt that war debts were doubtless unenforceable against successor states: 'repudiation of war debts by the successor state has been well established and continuously applied during the twentieth century in state practice.'[16] Sack, relying on the views of Jèze, Hyde and Lawrence, as well as considerable state practice, also agreed – as did John Westlake and Amos S Hershey.[17] Opposed to these views were those of Feilchenfeld and Oppenheim. Cahn examined the question in greater detail than either Feilchenfeld or Oppenheim,[18] and concluded that both

[14] Hoeflich, 'Through a Glass Darkly', 56–57 (discussing the claims relating to the South American guano cases, where the British government officers found that '[a]lthough it would be more equitable that when a part of the territory of one state is acquired by another by conquest, a part of the debt of the conquered country, if any exists, proportionate to the territory so acquired, should be taken over with it; yet there cannot be said to be any absolutely settled rule of international law to that effect.' They advised that the British government advance equity-based arguments rather than legal ones).

[15] Adopted 12 December 2000, in force 12 December 2000, 2138 UNTS 85, 93. For more background on the Claims Commission, and a critique of some of its findings, see C Gray, 'The Eritrea/Ethiopia Claims Commission Oversteps Its Boundaries: A Partial Award?' (2006) 17 *EJIL* 699.

[16] Cahn, 'The Responsibility of the Successor State', 486.

[17] J Westlake, *International Law: Part I, Peace* (Cambridge: Cambridge University Press, 1904), p. 78ff (recognising war debts as exceptions to the rule that a successor state is liable for the obligations of its predecessor); AH Hershey, 'The Succession of States' (1911) 5 *AJIL* 285, 296.

[18] See HJ Cahn, *Das Kreigsschadenrecht der Nationen* (Zurich, New York: Europa, 1947) (a book setting out a theory for indemnities for war damages but containing a vast general survey of literature concerning pecuniary claims in times of war). See book note by

views were wrong, particularly since neither took account of post-WWII practice.

Furthermore, whether or not it amounts to a general principle of law, there is an established line of authority in both English and US laws that war debts or 'trading with the enemy' renders a contract unenforceable. The learned English treatise *Chitty on Contracts* summarises the applicable law as follows:

> All trading with the enemy, except with royal licence, is against public policy. On the same principle 'it is not competent to any subject to enter into a contract to do any thing which may be detrimental to the interests of this country in time of war or involving intercourse with or benefit to the enemy, however insignificant in quantum and notwithstanding the benefit which may accrue to this country from such a contract.'[19]

The position in the United States is effectively the same. In 1872, the US Supreme Court held that 'all commercial transactions of whatever kind (except ransom contracts), with the subjects, or in the territory of the enemy, whether direct or indirect, as through an agent or partner who is neutral, are illegal and void.'[20] This was a principle of law affirmed by the Court but drawn nearly verbatim from an esteemed American treatise on international law. Though the case is old, it is still good law. It reflects a position more generally taken after the conclusion of the Civil War that all debts in aid of the rebel authorities were illegal and void. This was the United States' position towards the Confederate debts, both under the Fourteenth Amendment of the US Constitution and as confirmed in the unanimous decision of the British-American Claims Commission: 'the United States is not liable for the payment of debts contracted by the rebel authorities.'[21] This was the case notwithstanding the fact that the Confederacy was the de facto authority in defined territory at the time.

JL Kuntz 'Book Review: *Das Kriegsschadenrecht der Nationen*. By Hans Joseph Cahn. First Volume', (1948) 42 *AJIL* 521.

[19] See H Beale, *Chitty on Contracts*, 31st edition, 2 vols. (London: Sweet & Maxwell, 2012), vol. I, 16–026 (citations omitted).

[20] *Montgomery v United States*, 82 US 395, 400 (1873).

[21] JB Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party, Together with Appendices Containing the Treaties Relating to Such Arbitations, and Historical and Legal Notes*, 5 vols. (Government Printing Office, 1898), vol. I, p. 695.

C. *Illegal War Debts*

All the principles and authorities above concern debts that were contrary to the interests *of the successor state*. However, some may use the term 'war debt' to refer to those debts made in order to support the prosecution of an illegal war against an enemy other than the population of the debtor state or the successor state. For example, if a state (e.g. Iraq) borrows from another state (e.g. Kuwait) to finance an illegal war against a third state (e.g. Iran), is that debt enforceable by the Kuwaiti creditors against Iraq? Or is it unenforceable on account of the fact that it was knowingly made to fund an aggressive illegal war?

Mohammed Bedjaoui introduced a new category of odious debt to address debts of this nature: those contracted for aims and purposes not in conformity with international law. Illegal wars were a key example. The general prohibition on the use of force is a *jus cogens* norm.[22] The legal logic of Bedjaoui's position is unassailable because as I show in, section II.D below, any international agreement that violates a *jus cogens* norm is void to the extent of such a conflict. Despite this, there is not much by way of practice of avoiding such debts that is immediately discernible. After World War I, for one instance, certain debts contracted by Bulgaria were exempted from allocation because they were contracted to finance 'a war of aggression'.[23] The recognition of such a principle would have the same effect in cases of either state succession or where there has been a change of government. Thus the consequences of this position may admittedly be enormous. Wealthy countries which prosecute illegal wars, or lend assistance in having them prosecuted in other countries, would be odious creditors under this legal principle. Contracts for the supply of military hardware in some circumstances may be considered unenforceable. No doubt some will reason that such a result is absurd and thus the principle is unacceptable. Such a claim may travel far in politics, but has a foundation in neither law nor logic. There is nothing absurd about holding the powerful equally to account under settled principles of international law.

[22] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, ICJ Reports (1986) 14, para. 190; Crawford, *Brownlie's Public International Law*, p. 595.

[23] Cahn, 'The Responsibility of the Successor State', 484.

II. Subjugation Debts

Though the word 'subjugation' sounds dramatic in the context of international commercial law, it captures better than any other concept an essential aspect of this category of odious debt, namely, that it must be aggressively contrary to the interests of the population of a debtor state. A variety of terms have been used to describe this category of odious debts. 'Hostile debts' was the term used by O'Connell and Hyde, borrowed from Sack, to describe one category of odious debts.[24] Jèze referred to 'regime debts', Bedjaoui to 'subjugation debts', Feilchenfeld, and again the American Commissioners, to 'imposed debts'.[25] The unifying theme is that the loans must have been actively hostile to the interests of the population, a condition that in my view is not always made out clearly when the loan is procured through bribery or is funding a kleptocrat. When one examines the precedents for this type of debt, one sees that the threshold for harm is normally quite high. In my view, the idea of subjugation debts best approximates this.

This section ultimately brings Bedjaoui's definition up to date by specifying it by reference to contemporary standards of international law. I define 'subjugation debts' as follows: subjugation debts are those debts that are made for the purpose of facilitating the violation of *jus cogens* norms, or the commission of serious or flagrant violations of human rights, humanitarian law, or other fundamental international law principles in respect of the population of the debtor state. This definition flows from the precedents, observes the high threshold, but uses contemporary standards of international law to give greater specificity to the notion of harm to the population. Any subjugation debt that meets that definition, whether in state or government succession, *ex hypothesi* violates the most important norms of international law, and so there is no sound legal argument for their enforcement under international law.

[24] DP O'Connell, *State Succession in Municipal and International Law*, 2 vols. (Cambridge: Cambridge University Press, 1967), vol. I, p. 458ff; CC Hyde, *International Law, Chiefly as Interpreted and Applied by the United States*, 3 vols. (Boston, MA: Little Brown & Co, 1947), vol. I, p. 412; LC Buchheit, GM Gulati and RB Thompson, 'The Dilemma of Odious Debts' (2007) 56 *Duke LJ* 1202, also link the concept to the Cuban loans case.

[25] Feilchenfeld, *Public Debts and State Succession*; JB Moore, *Digest of International Law*, 8 vols. (Washington, DC: Government Printing Office, 1906), vol. I, p. 358.

A. *Opinions of Writers, Treaties and General Principles*

I have already discussed the Vienna Convention on the Succession of States (Debts), and showed it has not come into force. Once it is determined that subjugation debts have the character I ascribe to them below, a large number of other treaties relating to human rights, peremptory norms, and the UN Charter become central to the question of whether some debt is a subjugation debt. These are so numerous and familiar that the reader will be grateful for my omitting the rehearsal. One may consult any treatise on international law, the law of human rights, or international humanitarian law.

The opinions of legal writers on the existence of odious debt in international law are divided in a few ways. Of considerable note is the recent surge in writing about this topic. Many of such articles express strong scepticism or clear rejection of the claim that any doctrine exists.[26] But clearly the sheer volume of articles expressing such a view is not determinative of what counts as authority under article 38(d) of the ICJ statute, which refers to the most highly qualified publicists.[27] It is notable that many of such writers are not scholars of international law, the quality varies, and there is substantial repetition. Similarly, the study conducted by non-lawyers at the World Bank cannot be regard as authoritative in the sense understood in international law.[28] At the same time, we are witnessing the convergence of principles of domestic private financial law and practice, and international law and sovereign borrowing practices, which may perhaps be a new field which defies easy classification under the ICJ Statute's concepts. In my view, the weight to be accorded to these sources should flow from *what* is said (i.e. the quality of the argument and evidence), rather than *who* said it (i.e. the status of the authors), or for that matter how many said it. As has been observed already, the

[26] See above, notes 1 and 3.

[27] M Wood, 'Teachings of the Most Highly Qualified Publicists (Article 38 (1) ICJ Statute)' in R Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2013) <www.mpepil.com>, accessed 22 July 2015. He speaks of 'eminent' writers, 'the opinions of the best qualified publicists', 'the principal jurists', whose 'writing carries authority as such' [3]–[10]. Elsewhere, he refers to and notes the problem of variable skill and integrity: [10]. Wood says that the views of the International Law Association, the Institut de Droit International and especially the International Law Commission carry special weight.

[28] V Nehru and M Thomas, 'The Concept of Odious Debt: Some Considerations' (22 May 2008) World Bank Economic Policy and Debt Department Policy Paper, <elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4676>, accessed 22 July 2015.

content of the claims are usually that the precedents are meagre, there has been no overt recognition, and the principle of *pacta sunt servanda* is applicable and decisive. All such claims have been addressed above and below.

As for those writers who mainly focus on international law, the weight of opinion suggests either that there is no clear duty for a successor state to assume odious debts or that there is no clear duty for it to assume any debts at all, except for in equitable proportions.[29] There has also been substantial recognition of the doctrine of odious debt in such terms by Sack, Hyde,[30] O'Connell, Menon, Bedjaoui (and through him a Special Rapporteur of the ILC), the International Law Association and Robert Howse, though it was denied strongly by Feilchenfeld. These are all unquestionably highly qualified publicists within the Statute's meaning. However, there is no similar body of agreement with respect to the enforceability of subjugation debts in cases of change of government. Most writers express no view on the issue apart from affirming the principle of continuity in responsibility for state debts. This does not mean, however, that such writers would find subjugation debts as defined in this section non-binding absent state succession. No international lawyer, it may be safely said, would find that an agreement whose aim was to facilitate the violation of a *jus cogens* and other serious or grave breaches of international law is binding under international law.

General principles of private law do not speak directly to the category of subjugation debts. Subjugation debts, unlike say corruption debts or 'trading with the enemy', have not arisen in such terms in the private law of domestic legal systems, for subjugation tends to relate to public rather than private law concepts. However, my exploration of some basic principles of contractual and non-contractual obligations in chapter 4 below notes that principles relating to public policy in domestic contract law suggest very potent reasons to believe that subjugation debts would be contrary to international public policy, and that claims in restitution would offer cold comfort to creditors whose contracts were deemed unenforceable on such grounds.

[29] See chapter 2, section III.

[30] Hyde, *International Law*, recognised the importance of public benefit, and found hostile debts not to pass except in cases of total absorption of a previous state.

B. *Precedents Concerning State Succession*

There are a range of precedents in state practice concerning subjugation debts whose repayment debtor states or other powers refused to countenance in view of the debts' odious character.

1. Mexican repudiation of European debts (1883)

Two instances of debts repudiated by the Mexican government in the late nineteenth century conform to the definition of 'subjugation debts' and were referred to by Sack as instances of odious debt.[31] He notes that the Mexican law of 18 June 1883 on the determination of the national debt, which recognised *some* of the outstanding Mexican debts, refused to recognise what were described as debts issued by 'the governments that pretended to exist in Mexico from 17 December 1857 to 24 December 1860 and from 1 June 1863 to 21 June 1867'.[32] The first of these debts relates to loans obtained after Félix Zuloaga led a coup d'état, supported by conservative and church forces, against the constitutional government on 17 December 1857.[33] The coup triggered the Mexican War of Reform, during which conservative and liberal forces battled for control of the country. Eventually, conservative power passed from Zuloaga to Miguel Miramón, who borrowed heavily from European creditors to maintain power. Ultimately, the liberals regained power under the guidance of Benito Juárez, who ultimately became the next president. Due to the exhaustion of state finances during the war, Juárez declared a moratorium on foreign debt payments. Securing repayment served as a pretext for the invasion of forces from Spain, Great Britain and France. Spain and Great Britain seized the Customs House, but it soon became apparent that France had colonial designs, aiming to install Austro-Hungarian Archduke Maximilian as Emperor, to govern Mexico in European interests. After three years of civil conflict between

[31] Sack, *Les effets des transformations des États*, p. 158. For a general history of the period, J Bazant, *Historia de la Deuda Exterior de México 1823–1946* (Mexico: El Colegio de Mexico, 1968), pp. 84–99.

[32] Sack, *Les effets des transformations des États*, p. 158 (my translation of following text). 'La loi du 18 Juin 1883 ne reconnut pas les dettes contractées "par les gouvernements qui prétendaient avoir existé au Mexique du 17 décembre 1857 au 24 décembre 1860 et du 1er juin 1863 au 21 juin 1867"'. See also Sack, *Les effets des transformations des États*, p. 18, for fuller discussion of the Mexican law and other instances of repudiation by Mexican governments.

[33] For the period more generally, see Bazant, *Historia*; H Montgomery Hyde, *Mexican Empire: The History of Maximilian and Carlota of Mexico* (London: McMillan, 1946); R Chartrand and R Hook, *The Mexican Adventure 1861–67* (London: Osprey, 1994).

Maximilian's effective control and Juárez's government in exile in the north of Mexico, the republican forces eventually prevailed and Maximilian was put to death.

This brief history provides examples of debt repudiation in both cases of state succession (as with Maximilian) and during a change of government (as with Zuloaga and Miramón). Pomeroy notes that Miramón's debts '[had] been created to maintain that usurper in his place against the legitimate authority and all of them were most scandalously usurious'.[34] These debts were subjugation debts contracted without the consent of and against the interests of what was regarded as the democratically elected government of the country.[35] There was no change in sovereignty (as between states) in the period during which they were made.

The debts contracted by Maximilian were also repudiated in their entirety as illegitimate and contrary to the interests of Mexico. As Sack notes, Maximilian borrowed from England and France under highly onerous conditions at a time when he used the French army to put down a continuous national resistance led by Benito Juárez. The US government later argued for the enforceability of some of Maximilian's debts against Mexico on behalf of a naturalised American citizen. At arbitration, the umpire rejected the 'evil' proposition, finding that the loan was for 'armed men fighting under the usurper's flag, and contracted with the authorities of a temporary government at war with that government which is now called upon to make payment'.[36] At least five other similar claims were rejected.[37]

2. The non-apportionment of debts relating to Cuba (1898)

The Cuban Loans negotiations at the Paris Conference of 1898 are often (though not by Sack) regarded as the first direct application of a doctrine of odious debts.[38] The conference was a part of the peace negotiations that followed the Spanish-American War of 1898. The Cuban debts consisted of various loans issued by the Spanish government after 1880. Two Spanish laws consolidating and converting previous loans were

[34] JN Pomeroy, *Lectures on International Law in Time of Peace* (Boston, New York: Houghton Mifflin, 1886), p. 75.

[35] See generally Bazant, *Historia*, pp. 84–99.

[36] *Stückle's Case (F W Stückle v Mexico)* (19 July 1871); Moore, *International Arbitrations*, vol. III, p. 2938.

[37] Moore, *International Arbitrations*, vol. III, p. 2938.

[38] See Moore, *Digest of International Law*, vol. I, pp. 351–385, for the oral arguments of the Spanish and American Commissioners during negotiations; see also Feilchenfeld, *Public Debts and State Succession*, pp. 329–343.

passed in 1884 and 1885, respectively.[39] A loan was then floated by Royal Decree in 1886,[40] which provided that the revenue from the Island of Cuba would serve as a pledge on the security of the loan:

> In order to satisfy the interest and the redemption of the Mortgage Bills, there shall be consigned every year in the Budget of the Island of Cuba the necessary amount for these costs . . . The new bills shall have the special guarantee of the receipts of the Customs, the Seal, and the stamp office, of the Island of Cuba, the direct and indirect taxes existing in the Island, or which may be established there in the future, and the general guarantee of the Spanish nation.[41]

The Cuban loans were in fact contracted under Spanish laws, and Spain had undertaken to provide a guarantee for them.[42] As they were secured upon Cuban revenues, the issue between the United States and Spain was whether those financial obligations devolved to the United States upon the cession of the territory. The Spanish argument consisted of two primary parts: (1) that Spain was entitled to repayment by virtue of its prior sovereignty over the territory, and (2) that it was entitled by virtue of the revenue pledges (what Feilchenfeld calls the 'local connection').[43] The Americans opposed both of these arguments vigorously, but it was in opposition to the second that they raised the defence that the debts were odious and thus not repayable.

Part of the Spanish Commissioners' claim appeared to assert an equitable right of repayment, based on the idea that the debts were contracted for the purpose of governing Cuba:

> It would be contrary to the most elementary notions of justice and inconsistent with the dictates of the universal conscience of mankind for a sovereign to lose all his rights over a territory and the inhabitants thereof, and despite this to continue bound by the obligations he had contracted exclusively for their regime and government. These maxims seem to be observed by all cultured nations that are unwilling to trample upon the eternal principles of justice . . .[44]

[39] Feilchenfeld, *Public Debts and State Succession*, p. 332.
[40] Moore, *Digest of International Law*, vol. I, p. 358.
[41] Cited in Feilchenfeld, *Public Debts and State Succession*, p. 333.
[42] Moore, *Digest of International Law*, vol. I, p. 363 (calling the guaranty a 'subsidiary obligation to repay').
[43] Feilchenfeld, *Public Debts and State Succession*, pp. 333–334.
[44] Cited in Hoeflich, 'Through a Glass Darkly', 52–53; Feilchenfeld, *Public Debts and State Succession*, p. 336.

This claim invited the equitable response that the regime in question was not representative of the island's interests. The American Commissioners argued that the debts were not properly chargeable to Cuba. The loans had not been contracted for the benefit of Cuba, but rather contrary to its interests, and the burdens connected with those loans had been imposed upon Cuba without its consent

> From no point of view can the debts above described be considered as local debts of Cuba or debts incurred for the benefit of Cuba. In no sense are they obligations properly chargeable to that island. They are debts created by the government of Spain, for its own purposes and through its own agents, in whose creation Cuba had no voice, from the moral point of view, the proposal to impose them upon Cuba is equally untenable. If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose upon the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hope and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence would be even more unjust.[. . .] [The instances of state practice adduced by Spain] are conceived to be inapplicable, legally and morally, to the so-called 'Cuban debt', the burden of which, imposed upon the people of Cuba without their consent and by force of arms, was one of the principal wrongs for the termination of which the struggles for Cuban independence were undertaken.[45]

The American Commissioners further stated that 'the creditors knew that the revenues were pledged for the continuous effort to put down a people struggling for freedom from Spanish rule' and that 'they took the obvious chances of their investment on so precarious a security.'[46] The fact that the Spanish disagreed with the US position does not have the significance, some contend,[47] for the real question is whether there was agreement on a legal duty to repay those debts in particular. At any rate, legal commentators at the time were more charitable: Charles

[45] Feilchenfeld, *Public Debts and State Succession*, p. 337. The passage quoted above is reproduced in Moore, *Digest of International Law*, vol. I, pp. 358–359.

[46] Feilchenfeld, *Public Debts and State Succession*, p. 341, citing the memorandum of the American Commissioners; see also Moore, *Digest of International Law*, p. 368.

[47] Gelpern believes this undermines the legal status of the doctrine: A Gelpern, 'What Iraq and Argentina Might Learn from Each Other' (2005) *Chi J Int'l L* 391, fn. 50. In my view this confuses the appropriate burden of proof, and at any rate, the lack of agreement is at the very least equally significant for the asserted rule of repayment.

Cheney Hide called the US position 'unassailable' and John Westlake, of comparable if not superior renown, agreed.[48]

Two further aspects of this precedent stand out. First, the American position exceeded the terms of the doctrine because it refused to assume *any* of the debt when at least 25 per cent of it fell outside its own definition of odiousness.[49] Second, the United States did not feel it necessary to arbitrate the debt. These potential injustices (if unpaid colonisation debts can possibly be so characterised) support the view that the use of a tribunal and the duty to arbitrate are important safeguards against opportunistic state behaviour.[50]

3. The non-apportionment of the Baltic portion of imperial Russian debts (1920)

In the series of treaties concluded between Russia and Finland, Estonia, Latvia, Lithuania and Poland in 1920, it was stipulated that none of the states would assume any of Russia's debts.[51] Feilchenfeld added that such treaties must be construed in light of Russia's repudiation of its own debts. He suggests that their function was to 'centralize' the negotiations concerning the payment of Imperial Russian debts, and to ensure that no debts were paid or negotiated contrary to Russia's wishes. Whatever the value of this theory, Russian conduct was consistent with its general approach to the validity of the economic and imperialist policies of the Tsarist government, as well as with the Soviet position on national self-determination.[52] Russia recognised 'unreservedly' Estonia's right to self-determination and its independence from former Russian domination in Article 2 of the Treaty of Tartu between Russia and Estonia, which inaugurated a twenty-two-year period of independence for Estonia, under most of which it was a parliamentary democracy.[53] Russia also

[48] Hyde, *International Law*, p. 411.

[49] Feilchenfeld, *Public Debts and State Succession*, pp. 339–340.

[50] There are references to the 'legality' of the American position, in contrast to what Feilchenfeld identifies as a 'not strictly legal' position, in Moore, *Digest of International Law*, vol. I, pp. 358, 359, 376 and 385.

[51] Feilchenfeld, *Public Debts and State Succession*, pp. 537–540.

[52] VI Lenin, 'The Revolutionary Proletariat and the Right of Nations to Self-Determination' in *Collected Works*, 45 vols. (Moscow: Progress Publishers, 1974, original published in 1915), vol. 21, p. 407ff.

[53] Treaty of Peace between Russia and Estonia, 2 February 1920, in force 2 February 1920, XI:1 League of Nations Treaty Series 51ff. Article 1: 'On the basis of the right of all peoples freely to decide their own destinies, and even to separate themselves completely from the State of which they form part, a right proclaimed by the Federal Socialist Republic of Soviet Russia, Russia unreservedly recognizes the independence and autonomy of the

surrendered all its rights to property of the former empire, including various buildings, forts, harbours and warships, as well as rights held against Estonian individuals.[54] It was, moreover, well known to states[55] and writers[56] that Russia and its former Balkan territories could not by way of bilateral treaty immunise any of the successor states from liability towards third-party states or nationals thereof. Most importantly, Feilchenfeld's thesis ignores the position of some voices within the Baltic republics themselves. The attitude was summarised in a Latvian periodical, which responded to arguments for why the Baltics should bear some responsibility for the Russian debt put forth by none other than the odious debt champion himself, Alexander Nahum Sack:

> [I]t would be useless to try to persuade Mr. Zack [*sic*] that Russia, having occupied Latvia and other Baltic States by force, exploited them to their utmost limit; . . . that consequently these countries for their part should present their accounts to Russia for the periods in question, that they suffered gigantic losses during the world war fighting for Russia's fate . . . and many other items could be written in the balance sheet, not to mention moral suffering, oppressed national aspirations, retarded cultural and economic development. Thus, these States might well 'capitalize' huge losses and present a bill which would be heavy with blood and tears.[57]

Thus the Baltic republics took a stand against the positions of other Allied states in public international law. Had they accepted the principle of state succession, they would have known that their treaty with Russia could

State of Esthonia, and renounces voluntarily and forever all rights of sovereignty formerly held by Russia over the Esthonian people and territory by virtue of the former legal situation, and by virtue of international treaties, which, in respect of such rights, shall henceforth lose their force.'

[54] Ibid., article 11. In article 12, Russia even agrees to pay Estonia the sum of 15 million Gold roubles. Feilchenfeld, *Public Debts and State Succession*, pp. 537–538, fn.14, mistakenly assumes that this is a payment by Estonia to Russia. This interpretation accords with neither the French ('La Russie accorde a l'Esthonie) nor English ('Russia grants Esthonia') nor even German translations of the treaty ('Zahlt Russland Estland 15 Millionen Rubel in Gold . . . ').

[55] G Heumann, *Aspects Juridiques de L'Indépendence Estonienne*, 2nd edition (Paris: Editions Pedone, 1938), p. 140; Sack, *Les effets des transformations des États*, pp. 244–245 (English and French positions).

[56] Heumann, *Aspects Juridiques de L'Indépendence Estonienne*, pp. 139–140; Sack's position as stated in A Bilmans, 'The Russian State Debts and the Baltic Republics'(1925) 6 *The Latvian Economist* 17.

[57] Bilmans, 'The Russian State Debts', 18. The author continues to show that, on purely economic terms, Russia took much more than Latvia gained from the colonial arrangement.

not immunise them from apportionment, a liability which remained acute at the time due to Soviet Russia's notorious repudiation. Rather, the position was that the state would neither recognise nor abide by any right to repay Russia's debts, which were readily recognised as contrary to their interests by both Soviet Russia and the Baltic republics.

4. The non-apportionment of debts relating to Poland (1919)

In 1866, a fund of 100,000,000 marks was put at the disposal of the Prussian government in order for it to fund the purchase of Polish estates by ethnic Germans.[58] That fund was replenished in 1898, and again in 1902. As the measures were designed to expand the Prussian dominion and culture, and limit the native Polish influence, few Polish estate holders were willing to sell. Thus the Prussian government passed a law in 1908, allowing for the expropriation of such territories with compensation, and simultaneously increased the fund by 25,000,000 marks and authorised the issue of bonds.

O'Connell writes that the doctrine of odious debts 'was the test employed in the drafting of the Treaty of Versailles, which exempted Poland from the apportionment of [these] debts'.[59] The debts were singled out in Article 255(2) of the Treaty of Versailles (28 June 1919):

> That portion of the debt which, in the opinion of the Reparations Commission, is attributable to the measures taken by the German and Prussian Governments for the German colonization of Poland, shall be excluded from the apportionment to be made under article 254.

The Allied Powers were later to declare that '[i]t cannot be contemplated that Poland should bear either directly or indirectly the burden of a debt contracted to extend Prussian influence at the expense of Polish rights and traditions.'[60] The Reparation Commission found it a just reversal of 'one of the greatest wrongs of which history has record'.[61]

In addition to O'Connell, this action was also viewed as an application of the doctrine of odious debt by Sack, Hyde and Bedjaoui.[62] Feilchenfeld

[58] The details of the debts are provided in Feilchenfeld, *Public Debts and State Succession*, pp. 450–453.

[59] O'Connell, *State Succession*, p. 460.

[60] 'Reply of the Allied and Associated Powers', *British and Foreign State Papers* (London: HM Stationary Office, 1922) 290, cited in Bedjaoui, Ninth Report, p. 73.

[61] O'Connell, *State Succession*, pp. 460–461. History would shortly record much greater wrongs by Germany in Poland.

[62] Sack, *Les effets des transformations des États*, pp. 163–164; Bedjaoui, *Ninth Report*, p. 73, para. 168; Hyde, *International Law*, p. 407 (not endorsed as 'odious debt' per se but cited as an instance of the author's own benefit principle).

simply notes that the test did not receive the general approval of the Central Powers, and so he finds it a dubious example of a norm generally accepted as law. Again, however, it is not in my view the odious debt claim that must meet the level of generality but rather the rule of repayment in such circumstances.

5. Various decolonisation debts (1761–1960s)

Mohammed Bedjaoui has compiled a list of instances in which states emerging from colonisation have failed to assume all debts, noting in which cases certain odious debts were excluded.[63] An early example is that of the United States, which emerged by thirteen colonies in British North America declaring their independence from the British Crown.[64] No debt whatsoever was assumed. A similar situation took place in Brazil in 1824. Brazil balked at the suggestion that it should carry any of the debt contracted by the Portuguese government in its name. It showed that neither Holland nor Portugal itself had assumed any debt upon separating from the Spanish Crown.[65] As noted above, a similar situation arose with Cuba in 1898.

There are instances in which emerging states have assumed colonial debts. In Latin America, Mexico, Ecuador, Colombia, Argentina and Bolivia recognised all debts charged by Spain to their respective treasuries.[66] Bedjaoui notes, however, that 'the precedents set by the South American republics were not followed in subsequent cases.'[67] In many cases, they agreed to such assumptions in return for recognition.[68] The Philippines, as well as India in respect of Great Britain, and Pakistan in respect of India, recognised all or the vast majority of their former rulers' debts.[69] In the case of Libya's liberation from Italy after World War II, Guinea's independence from France in 1958, the Belgian Congo's independence from Belgium in 1960, Indonesian independence in 1949 and Algerian independence in 1962, conversely, there was no automatic recognition of the colonial power's

[63] Bedjaoui, *Ninth Report*, pp. 93ff.

[64] Ibid., p. 93, para. 288; Feilchenfeld, *Public Debts and State Succession*, p. 54; Moore, *Digest of International Law*, p. 392 (American Commissioners rejecting the contrary argument submitted by Spain); R Howse, 'The Concept of Odious Debt in International Law' (2007) 185 *United Nations Conference on Trade and Development: Discussion Papers* <www.unctad.org/en/docs/osgdp20074_en.pdf>, accessed 22 July 2015, 10, also discusses the refusal to assume Confederate debts under the Fourteenth Amendment of the US Constitution.

[65] Bedjaoui, *Ninth Report*, p. 93, para. 289. [66] Ibid., pp. 91–93.

[67] Ibid., p. 93, para. 287. [68] Bedjaoui, *Ninth Report*. [69] Ibid., p. 95.

debts.[70] The same is true of the emergence of the state of Israel.[71] Yilma Makonnen notes that in Africa, where a large number of colonies did assume colonial debts, there was 'no acceptance of automatic succession to public debts as a matter of legal obligation'.[72] Tanzania, Eritrea and Rwanda and Burundi each emerged without bearing the full brunt of their predecessor's debts.[73]

Instances of decolonisation are considered by some to be *sui generis* because they received separate treatment in the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts and the reports of the special rapporteur.[74] That is, however, an arbitrary distinction so far as the present topic is concerned. There were other reasons to keep them separate as articles in the Convention. The main one is that the clean slate principle was advocated in cases of decolonisation. In other words, all debts were to be wiped off, regardless how beneficial they might have been. As will be seen in the following examinations of Indonesia and Algeria, it has in fact been somewhat common in debt apportionment negotiations between former colonies and their colonisers to distinguish particular debts as odious from others attached to certain benefits.

6. Debts relating to Dutch administration of Indonesia (1949)

The case of the Indonesian debt is classified as a subjugation debt in Mohammed Bedjaoui's report to the International Law Commission.[75] At a Round Table Conference held in The Hague between 23 August and 2 November 1949, the Indonesian government agreed to assume certain debts incurred prior to the Dutch surrendering the Indonesian territory to Japan in 1942. It refused, however, to assume 'various debts ... particularly those resulting from Netherlands military operations against the Indonesian national liberation movement'.[76] After considerable negotiations, however, it was agreed to apportion this debt such that

[70] Ibid., pp. 96–99. [71] O'Connell, *State Succession*, p. 431.
[72] Y Makkonen, *International Law and the New States of Africa* (Paris: UNESCO, 1983), p. 375.
[73] Makkonen, *International Law and the New States of Africa*, p. 434, fn 164 (Eritrea), 408 (Tanzania) and 408–409 (Rwanda and Burundi).
[74] See chapter 2, section III.C above; Cheng, 'Renegotiating the Odious Debt Doctrine', 7, 24.
[75] Bedjaoui, *Ninth Report*, pp. 73–74, paras. 169–170; see also R Chauvel, *Nationalists, Soldiers and Separatists: The Ambonese Islands from Colonialism to Revolt 1880–1950* (Leiden: KITLV Press, 1990), chs. X, XV, and XVI.
[76] Bedjaoui, *Ninth Report*, p. 73, para. 169.

4.5 billion guilders were assumed by the Indonesian government, and 2 billion by the Netherlands. This agreement was denounced by the Indonesian government in 1956, and thus the debt remained unpaid.

The odious character of these debts was also an issue for Dutch nationals formerly resident in Indonesia. In *Poldermans v State of the Netherlands*,[77] the claimant was a Dutch civil servant employed in the Netherlands Indies administration. He was interned for a period of three years following the occupation of the colony by the Japanese in 1942, and sought compensation for lost salary. The Court of Appeal in The Hague denied compensation, finding that liability had passed to the United States of Indonesia pursuant to a Netherlands–Indonesian Agreement on Transitional Measures covering the passing of debt liabilities. The appellant invoked international law in support of the claim that the debt involved would not pass under the treaty 'because it was a debt arising from tort – the kind of debt which, owing to its so-called "odious" character, cannot be held to come under that provision'.[78] It can be assumed that Polderman feared that his claim would be rejected by Indonesia on grounds that it was odious. His tactic was right, for Indonesia was to denounce some of the agreements of 1949 and deny liability for particular debts. In its holding, the Supreme Court took a neutral position on the doctrine: 'whatever the value of this theory, its invocation in the present action is not warranted.'[79]

7. Debts relating to French administration of Algeria (1962)

France invaded Algeria in 1832 and ran the country as a colony until 1962, when independence was declared after a long and bloody war of national liberation.[80] The main settlement of succession of rights and obligations between the newly independent nation and France is contained in article 18 of the Declaration of Principles concerning the Economic and Financial Co-operation, contained in the Evian Agreement of 1962.[81] The article makes no express mention of succession to debts, and subsequent practice demonstrated that debts were regarded

[77] (1957) 24 ILR 69.

[78] *Poldermans v State of the Netherlands*, Hoge Raad, 15 June 1956, N.J. 1959, 72.

[79] Ibid. I would like to thank Dr Vanessa Mak for verifying this characterisation of the Dutch law report.

[80] M Bedjaoui, *Law and the Algerian Revolution* (Brussels: International Association of Democratic Lawyers, 1961) (for a survey of legal aspects of the liberation struggle in Algeria, not discussion of debts).

[81] 507 UNTS 25; reproduced in (1963) 57 *AJIL* 716, 732; see also Bedjaoui, *Ninth Report*, p. 99, para. 329.

as separately negotiable.[82] Negotiations on the assumption of public debts contracted by France in Algeria were carried out between 1963 and 1966, and resulted in the settlement of the claims with a lump sum payment to France. Bedjaoui notes that this was not succession of Algeria to France's debts; otherwise, payment would have been made to the third-party creditors and not to France.[83] The negotiations between the two countries demonstrate that there was no presumption that debts would be assumed, and much depended on mutual benefit.

Two categories of debts were singled out by Algeria as being manifestly not repayable. The first were debts representing loans contracted by France 'for the purposes of carrying out economic projects in Algeria during the war of independence', regarded as advancing the interests of French settlers and French presence in general, and facilitating disinvestment of French capital in Algeria.[84] The second were certain odious debts charged to Algeria to fund compensation under the territorial budget to victims of aggression by Algerian independence fighters, as well as expenditures related to the establishment and maintenance the *harki* force of fighters, namely, those Algerian fighters who were supportive of colonial rule.[85]

C. *Precedents Concerning Changes of Government*

1. The Mexican repudiation (1883)

As discussed in section II.B.1 above, Mexico repudiated debts contracted by Miramón between 1857 and 1860. These were recognised by Sack as examples of regime debts.

2. The Soviet repudiation and cancellation of Tsarist debts and loans (1918)

After the revolution of 1917, the Provisional Soviet government declared that it would repay the outstanding debt of the former regime.[86] Yet by

[82] Bedjaoui, *Ninth Report*, p. 99, para. 329.

[83] Ibid., p. 99, para. 330. This is not necessarily accurate if France was negotiating on behalf of French private creditors raising a claim under international law.

[84] Ibid., p. 99, para. 332. [85] Ibid., p. 99, para. 334.

[86] Sack, *Les effets des transformations des États*, p. 52. The question of the Russian debt is examined in detail by K Marek, *Identity and Continuity of States in Public International Law* (Geneva: Librairie E Droz, 1954), pp. 34–37; see also Hoeflich, 'Through a Glass Darkly', 62; TA Taracouzio, *The Soviet Union and International Law* (New York: MacMillan, 1935), pp. 249–250; O'Connell, *State Succession*, pp. 19–22, finding that debts were regarded by the Soviets as detrimental to the population.

1918, the Soviet government had repudiated the debt and it remains unpaid in full to this day. Hoeflich mentions that the debts may well have been regarded as 'odious'[87] and Sack refers to Soviet doctrine that regards acts of previous governments as incurring personal obligations only, not binding the state.[88] Foorman and Jehle cite a document in which the Soviet government supports its claim with the precedents of the US repudiation of its obligations towards England and Spain (presumably in respect of Cuba).[89]

The reasons given for the repudiation have been stated by the government of Russia at various times. In a decree on 28 January 1918 it declared that the debts would not be repaid because they were concluded 'by the governments of the Russian landlords or of the Russian bourgeoisie.[90] In a statement submitted to the Genoa Conference on 20 April 1922, the delegation claimed that although it was capable of paying, it would not because of 'matters of principle' and 'political necessity', – namely, because of the 'complete destruction of old economic and social relations'.[91] Elsewhere in the same memorandum, the reasons are given more forcefully:

> The Russian delegation is obliged to reject in a most categorical fashion any invitation to pay these debts, as an inadmissible attempt to charge a ruined Russia for a considerable portion of the Allies' war expenses. What we call the war debts of Russia in reality represent the weaponry created by Allied factories and sent to the Russian front to assure the success of the Allied armies. The Russian people sacrificed in the common cause of the Allies more lives than all others put together; it sustained colossal material losses and the result of the war was for it the loss of enormous territories that were primordial for its development. And whereas the other Allies obtained enormous increases in territories and reparations from the Treaties of peace, they wanted the Russian people to pay the costs of an operation that had been so lucrative.[92]

[87] Hoeflich, 'Through a Glass Darkly', 62. Hoeflich is concerned primarily with the argument of the British government towards the repayment of the debt, a position that he regards as 'somewhat strained' owing to its affirmation of settled international law regarding the payment by one government for a previous government's acts.

[88] Sack, *Les effets des transformations des États*, p. 68. Sack, who fared well in Tsarist Russia but who fled after the revolution, was generally critical of the Soviet repudiation.

[89] J Foorman and M Jehle, 'Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers' (1982) *U Illinois L Rev*, 20.

[90] Taracouzio, *The Soviet Union and International Law*, p. 250.

[91] Ibid., p. 249.

[92] Marek, *Identity and Continuity of States*, p. 36 (my translation; thanks also to Kevin Bailey for assistance).

In Soviet eyes, therefore, the debts were contracted for the benefit not of Russia, but of the Allies. Marek notes that the delegation was prepared to pay all contracts of public utility companies guaranteed by the Imperial government.[93] This suggests a possible consistency on the issue of public benefit, though apparent inconsistency with its decree of 28 January 1918.

The Soviet repudiation is often characterised as opportunistic, and perhaps no debt's link to public purposes under the previous government would have caused a different outcome. Yet while the British, French and United States are open to this charge in their attitudes, the Soviet position did have the merit of some consistency. In the Russia–Persia friendship treaty of 26 February 1921, article 8, the Russian government 'declares definitively renounced the economic policy pursued in the Orient by the tsarist government which consisted of lending money to the Persian government not for the economic development of the country, but rather for its political subservience ... Accordingly, Federative Russia renounces its rights concerning loans by the tsarist government consented to by Persia.'[94] Article 10 of the same treaty ceded, 'in full possession of the Persian people', various buildings, lands, railroads, ports, ships and other high-value rights.[95] Its renunciation of rights/claims towards China was even more extensive.[96]

3. The Chinese repudiation of Hukuang railroad debts (1952)

In 1911, the government of Imperial China contracted with a consortium of foreign investors to issue bearer bonds for the purpose of funding the construction of the Hukuang railway in southern China.[97] The railway was reportedly a key part of China's transportation infrastructure

[93] Ibid. [94] Sack, *Les effets des transformations des États*, pp. 245–246 (my translation).
[95] Ibid., p. 246 (my translation).
[96] See 'Agreement on the General Principles for the Settlement of the Questions between the Republic of China and the Union of Soviet Socialist Republics, Signed at Peking, May 31 1924' (1925) XXXVII League of Nations Treaty Series 176. Notable aspects include the renunciation of all pecuniary interests in the Chinese Eastern Railway (art IX), and of the Boxer Indemnity (art XI), whose funds both agreed would be 'appropriated to create a fund for the promotion of education among the Chinese people' (Declaration V).
[97] The factual background is summarised well in *Jackson v People's Republic of China*, 550 F Supp 869 (ND Ala 1982). The most thorough account of the bonds in the context of the odious debt debate is by JV Feinerman, 'Odious Debt, Old and New: The Legal Intellectual History of an Idea' (2007) 70 *Law and Contemporary Problems*, 193. This paper was retracted and a new one, with substantial corrections relating chiefly to a part of the paper other than the discussion of the Chinese railway bonds, can be found at <www.law.duke.edu/shell/cite.pl?70±Law±&±Contemp.±Probs.±193±(autumn±2007)±pdf>,

throughout the twentieth century.[98] It was part of the Manchu Reform Movement effort to modernise China, and was one of several similar transactions. A year after the bonds were issued, revolution led to the creation of the Republic of China. The new government continued to recognise and make interest payments upon the bonds, until 1930, when it renegotiated, ultimately delaying servicing the debt up to and throughout World War II. The People's Republic of China (PRC), led by the Communist Party of China, eventually forced the Republic of China government off the mainland. The PRC failed to make any further payment, and the bonds matured in 1952.

This episode is very clearly an instance of a state repudiating what it viewed as an odious debt, and it was identified in those terms by the PRC in the course of litigation before US courts. This complex litigation saga played out over four related cases, and they are worthy of some scrutiny for present purposes. The first was in the District Court of Alabama, brought as a class action for all holders of the Hukuang bonds. The PRC failed to appear, and the judge entered default judgment in the amount of over US$41 million.[99] This led to a major diplomatic incident between the United States and the PRC. The PRC felt it was entitled to absolute sovereign immunity and took up the incident directly with the US Secretary of State. It was persuaded by the US government to apply to have the default judgment set aside, and a District Court judge acceded in an unpublished order. A third District Court hearing was held, in which China filed a motion to dismiss the action.[100] It convinced the court that it lacked subject matter jurisdiction because the Foreign Sovereign Immunities Act that founded the plaintiff's claim could not be applied retroactively. The second and third cases were appealed to the Court of Appeals for the Eleventh Circuit, both appeals being dismissed. The US Department of Justice appeared as *amicus curiae*, arguing in support of the Chinese government. It filed representations on, inter alia, why the District Court judgment in setting aside the default judgment should be upheld. The Department argued that the Chinese government misunderstood the nature of its obligation to appear, partly due to its belief in the doctrine of absolute sovereign immunity, and partly due to the nature of the debt:

accessed 22 July 2015; see also E Theroux and BT Peele 'China and Sovereign Immunity: The Huguang Railway Bonds Case' (1982–1983) 2 *China L Rep* 129.

[98] *Jackson v People's Republic of China*, 871. [99] Ibid., p. 869.

[100] *Jackson v People's Republic of China*, 596 F Supp 386 (ND Ala 1984).

> [T]he Chinese view the bonds as an improper part of the Western powers' domination of China at the beginning of this century and as a direct cause of the Revolution of 1911; and that the PRC maintains that under the principle of non-liability for 'odious debts' China bears no responsibility for the bonds.[101]

The Court of Appeals held that the District Court was right in setting aside the judgment on the basis of a lack of subject-matter jurisdiction. At no point did it cast doubt on the validity of the claim regarding the odious nature of the debt. Indeed, the PRC's odious debt claim was expressly singled out as an important part of the *Jackson* judgment in *Gregorian v Izvestia*, a dispute involving the USSR in which it also argued that sovereign immunity laws entitled it to avoid appearing in US courts.[102] In this decision, the California District Court sought to distinguish *Jackson* while rejecting a similar argument about the ignorance of American restrictive sovereign immunity laws by the Soviet Union. It found that the court in *Jackson* had set aside the default judgment for four reasons, the second of which is relevant here:

> Second, the PRC had refused to submit to US jurisdiction because, in addition to its differing conception of sovereign immunity, it cited the doctrine of non-liability for 'odious debts' incurred by earlier Chinese governments. This constituted an issue of genuine historic significance for the Chinese and exceptional circumstances justifying relief from the default. Defendants here claim only that the USSR steadfastly adheres to the concept of absolute sovereign immunity. They even acknowledge the Court's subject matter jurisdiction over the contract claims.[103]

The Chinese government's direct invocation of the doctrine of odious debt in relation to the Hukuang bonds, the fact that the ground of the argument was not rejected by the court during the *Jackson* litigation, and the focus on this argument as an important part of the PRC's substantive

[101] *Jackson v People's Republic of China*, 794 F 2d 1490, 1495 (11th Cir. 1986), rehearing denied; *Jackson v People's Republic of China*, 801 F 2d 404 (11th Cir. Ala.) 3 September 1986, cert denied *Jackson v People's Republic of China*, 480 US 917 (US Ala 9 March 1987).

[102] *Gregorian v Izvestia*, 658 F Supp 1224 (CD Cal 1987).

[103] Ibid., p. 1238. The decision was overruled on a different but related point. The Court of Appeals found that a foreign defendant's reasonable belief that it is immune from suit cannot be characterized as 'culpable conduct' for the purposes of a rule allowing the court to set aside a default judgment. It rejected the District Court's attempt to distinguish the Soviet Union's claim from the PRC's in *Jackson*, but only because it felt that sovereign decisions were entitled to great deference. *Gregorian v Izvestia*, 871 F 2d 1515, 1525 (9th Cir. 1989).

claim in later litigation, strongly support the conclusion that this was an application of the doctrine by China, and in a case of government and not state succession.[104]

Whether the funds were in fact for odious purposes is another story, and one examined by Feinerman in greater detail.[105] That is not related to the legal issue of whether China asserted its view that there was no legal obligation to repay the debts it regarded as odious. It is a question of fact over which there is some dispute, at least in the view of the judge. The US government's position on the dispute was that jurisdiction ought not to be exercised.

4. Subjugation debt write-downs? Argentina (2001), Iraq (2004) and Ecuador (2009)

It is true that there has been a paucity of recent state practice in formally invoking the doctrine of odious debt. The reasons for this are unclear, but the implication is perhaps less significant than critics suppose. There has been an enormous amount of debt rescheduling since the 1970s.[106] Debtors who have objected to their debts on grounds of legitimacy have thus had a number of avenues short of seeking to avoid the debt claim by reference to the doctrine of odious debt. Strategically, consensual renegotiation and rescheduling would be more attractive and there must surely have been fear of the punitive sanctions following a repudiation: adverse credit rating, strained bilateral relations, and weakened access to multilateral lending institutions. A significant question is whether the mechanism of debt rescheduling to some extent explains why debtors have not applied the doctrine in recent years. I would argue that recent state practice concerning what might in some cases be called subjugation debt write-downs suggests that it does have this effect. While the examples considered below are not necessarily instances of odious debt as defined in this book, they are situations in where the political basis for large-scale rescheduling was the illegitimacy, odiousness or non-beneficial character of the debt.

The first was the case of Argentina's massive debt restructuring in 2001, which Anna Gelpern has surveyed in a very insightful analysis.[107]

[104] G Acquaviva, 'The Dissolution of Yugoslavia and the Fate of its Financial Obligations' (2002) 30 *Denver Journal of Int'l Law and Policy* 173, 188, fn. 69, was thus mistaken when he grouped it with other cases in which the claim was not accepted because it involved government and not state succession.

[105] Feinerman, 'Odious Debt, Old and New', 197–202. [106] See chapter 1, section II.E.

[107] Gelpern, 'What Iraq and Argentina Might Learn from Each Other', 402, 407–410. Though I consider Gelpern, along with Mitu Gulati and Lee Buchheit, to be among

In that case, the arguments Argentina officially advanced in favour of debt reduction were organised chiefly around legitimacy and capacity to pay, though even the 'capacity' arguments were made by reference to the need to protect basic economic and social rights to housing, jobs, education and health.[108] As Gelpern notes, President Nestor Kirchner, elected during the country's debt crisis, repeatedly called the old debt 'illegitimate' and blamed the creditors for financing bad policies.[109] So assuming Argentina did not officially invoke the view that the debt was not legally owed on grounds of its illegitimate origins (which is a large assumption), such a view was certainly a crucial part of the political process and motivation for its ultimate decision to reschedule 76 per cent of the debt and repudiate the rest vis-à-vis non-participating creditors.[110] As observed in chapter 1, creditors found some success in the courts. This is no more significant, however, than the fact that such creditors remain to be paid and participating creditors renounced their claims.

In the case of Iraq, public and private creditors took a very large loss on their debt claims against Iraq. The move was not motivated out of generosity. The rhetoric about odious debt within the Bush administration, in Congress, and in the activist literature and behind the scenes in

the most careful and nuanced of the doctrine's many critics, I disagree with most of what she says about the odious debt doctrine itself in this article, esp. at 406, where in my view she mistakenly asserts that advocates of the doctrine must satisfy the burden of showing general acceptance of the doctrine (rather than of a rule of repaying odious debts), and overlooks current expert international law opinion and Bedjaoui's report and international diplomatic approval of that approach that I detail in chapter 2. My original working paper, which Gelpern considers carefully and fairly before rebutting, encouraged the problem by overlooking some of these details and putting the doctrine across in a considerably less developed manner than the approach taken in this book. Gelpern's subsequent views on why Ukraine can avoid Russian loans to the outgoing President Victor Yanukovych in 2013 ('Ukraine's Odious Bonds: Part I and II' (RealTime Economic Issues Watch, Peterson Institute of International Economics) <http://blogs.piie.com/realtime/?p=4251>, accessed 22 July 2015) are in my view more consistent with the views stated in this book than those of her own expressed in her earlier work. Her belief that the United Kingdom could legislate to terminate claims against Ukraine makes 'repudiation' (which she advocates) dependent on Britain's legislative fiat (unconvincing), and on her own account of international law this would merely move the site of expropriation of contractual rights from Ukraine to the United Kingdom.

[108] Gelpern, 'What Iraq and Argentina Might Learn from Each Other', 408–409.

[109] Ibid., p. 408.

[110] Ibid, p. 410. For further information about the legitimacy of this debt, see JP Bohoslavsky and V Opgenhaffen, 'The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship' (2010) 23 *Harv Human Rights LJ* 157.

Iraq is well known.[111] It is true that the foreign-appointed Minister of Finance of Iraq, in 2004, was quick to disown the odious debt rationale,[112] but Justin Alexander has shown convincingly that other influential political leaders, including the interim Prime Minister, generally took the view both domestically and in various international fora that the debt was odious, suggesting that the political leadership chose to advocate the odious debt claims in public while being willing to accept a significant debt reduction in terms that did not refer to odious debt and thereby avoid establishing a difficult precedent for creditors.[113] Assuming that creditors viewed Iraq's threat of repudiation and US pressure as reasons why they accepted an 80 per cent reduction in obligations, the legitimacy of the justification behind the threat is relevant. Iraq's comparative wealth makes the capacity rationale weak, because even given the enormous size of the debt its oil resources put it in a better position than other heavily indebted countries typically found themselves in. If the odious debt doctrine was not applicable to Iraq, then it must be that the United States and its allies simply strong-armed Iraq's creditors. Though some commentators are highly critical of Ecuador's debt-legitimacy motivated sovereign default and buy-back in 2008–2009 (see further below), few characterise the US action as a form of legal duress in the same way. In my view, the unquestionably odious character of the Iraqi debt may explain part of this difference in international attitude. Iraq's private creditors were many and were no doubt strong-armed into a massive write-down. While the reduction was 81.5 per cent of the face value of the loans, the actual haircut (reflecting the outstanding principal as well as

[111] J Alexander 'Iraq and the Odious Debt Doctrine' (Working Paper, on file with author), Section 2.2; Adams, 'Iraq's Odious Debts'; see also the more sceptical view of J Damle, 'The Odious Debt Doctrine After Iraq' (2007) 70 *Law & Contemporary Problems* 139 (nonetheless claiming that the odious debt doctrine was an important part of the political background, though not the stated reason for which debt relief was sought).

[112] Mr Adil Abdul-Mahdi: 'Iraq's need for very substantial debt relief derives from the economic realities facing a post-conflict country that has endured decades of financial corruption and mismanagement under the Saddam regime. Principles of public international law such as the odious debt doctrine, whatever their legal vitality, are not the reason why Iraq is seeking this relief.' Cited in Gelpern, 'What Iraq and Argentina Might Learn from Each Other', 406. This statement is in a sense self-contradictory, leveraging the ideas of 'corruption' and 'mismanagement' as justifications for the threatened cancellation, while formally renouncing the doctrine of odious debt. Abdul-Mahdi was later elected and appointed by the government of Iraq to the position of vice-president.

[113] See Alexander, 'Iraq and the Odious Debt Doctrine', Section 6.2. Even the more sceptical Damle, who concludes that the doctrine was not the reason for Iraq's debt reduction, acknowledges that it was a crucial element of the political situation leading to the reduction.

interest payments) was 89.4 per cent.[114] Had Iraq's creditors said 'no' to the significant reduction to the debt, it seems likely that it would have remained unpaid on account of its origins and not Iraq's capacity to repay it. Iraq's oil reserves and the cost of oil at that time were such that capacity to repay could not be a valid reason, and if it were, then the implications for what must be done for much of the world's other impoverished nations are profound.

Ecuador's recent default and restructuring may have looked the most like an application of the odious debt doctrine, but in my view it cannot fairly be characterised as such. After the report of a debt-auditing commission appointed by President Rafael Correa,[115] Ecuador announced it would not honour its 2012 and 2030 Global Bonds (debts created between 1976 and 2006), and defaulted on them in November 2008.[116] In April 2009, Ecuador announced a buy-back offer through which it forced (through a promise of repudiation) creditors to agree to the repurchase of 91 per cent of the outstanding debt at a 65 per cent reduction from its face value. The default was not justified or explainable by reference to capacity to pay, at least if ordinary debt to GDP levels are accepted as an indicator of such capacity.[117] The basis was rather set out in the report of an audit commission, which was established by presidential decree in order to 'identify the legitimate and illegitimate debts, to establish the co-responsibility of the creditors and to set up precedents for a fair and responsible management of any new debt contract'.[118] Without passing any judgment on the actual legitimacy or odiousness of the Ecuadorian debt, and without failing to recognise how the

[114] US Das, MG Papioannou, C Trebesch, 'Sovereign Debt Restructurings 1950–2010: Literature Survey, Data and Stylized Facts' (2012) IMF Working Paper WP/12/203, p. 37, Table 5.

[115] Internal Audit Commission for the Public Credit of Ecuador, 'Final Report of the Integral Auditing of the Ecuadorian Debt – Executive Summary' (October 2008), <www.jubileeusa.org/fileadmin/user_upload/Ecuador/Internal_Auditing_Commission_for_Public_Credit_of_Ecuador_Commission.pdf>, accessed 15 July 2015.

[116] For a particularly well-informed critique of the move and timeline of events, see M Gulati and LC Buchheit, 'The Coroner's Inquest: Ecuador's Default and Sovereign Bond Documentation' (2009) 28 *IFL Rev* 22. See further, A Feibelman, 'Ecuador's Sovereign Default: A Pyrrhic Victory for Odious Debt?' (2010) 25(7) *J of Int'l Banking L and Reg* 357. For a more positive assessment, see W Mansell and K Openshaw, 'Suturing the Open Veins of Ecuador: Debt, Default and Democracy' (2009) 2 *L & Dev Rev* 151.

[117] Gulati and Buchheit, ibid.

[118] 'Final Report of the Integral Auditing of the Ecuadorian Debt – Executive Summary', 8. The objectives of the commission, set out more fully at 11 of the report, were framed in broader terms.

rescheduling probably contributed to the subsequent pronounced increase in social spending in Ecuador,[119] it must be acknowledged that the report of the commission does not present sufficient evidence to meet the legal requirements for an odious debt claim (at least as recognised in this book). Assuming the commission's findings are all true, there is no clear evidence of subjugation or careful linking of creditor awareness to the loan's purposes. For example, the report singles out contractual clauses such as waivers of sovereign immunity and choice of foreign law as leading instances of illegitimacy. Whatever the political merits of these clauses, they are standard aspects of commercial contracting and sovereign debt arrangements in particular. The report thus reveals a less than subtle appreciation of the mechanics of international sovereign finance, and the episode on the whole suggests the potential importance of a judicial or quasi-judicial process if the claims raised are meant to be legal rather than political.

Nevertheless, the report mentioned the concept of odious debt only twice in passing, and based several of its arguments on broader legitimacy grounds. In this sense, the doctrine's critics were quicker to use the 'odious debt' rhetoric than were the official documents upon which the calls for repudiation were based. And if the Ecuador case is viewed as a debacle for the odious debt doctrine, it can at least as easily be seen to demonstrate a predictable outcome of an international financial system that has no fair and objective mechanism for dealing with odious or illegitimate debts. The episode may also demonstrate the political limitations of the odious debt doctrine. If one believes Ecuador was politically justified and ultimately successful, then one also might believe it is so much the worse for the legal doctrine of odious debt if it cannot account for it.

So, while it appears that the experiences in Argentina, Iraq and Ecuador were not clear-cut applications of the odious debt doctrine, each case does help explain why countries have not always resorted to the option of total repudiation of what might be called odious debts. Debt rescheduling, backed by meaningful threats of repudiation, has provided a different route for debtors to renegotiate debts on grounds of their legitimacy. Furthermore, the idea that the economies in such nations would be punished and founder in great economic instability was

[119] See R Ray and S Kozameh, 'Ecuador's Economy since 2007' (2012) Working Paper, Center for Economic and Policy Research <www.cepr.net/index.php/publications/reports/ecuadors-economy-since-2007>, accessed 22 July 2015, 6–7.

contradicted by subsequent events in each of these three countries.[120] On the other hand, the judicial interpretation of the pari passu clause in the New York courts may well undo at least some of the success in the Latin American cases.

D. *Negative Precedents*

As noted in chapter 2 and in the previous section, there have been countries such as Iraq, Ecuador and South Africa that have deliberately considered and avoided making odious debt claims against creditors. These do not count against the existence of the doctrine because such states did not question the validity of the doctrine but rather pursued other, ultimately more successful strategies for attaining debt sustainability. However, some events can more straightforwardly be called negative precedents insofar as they amount to bad faith misapplications of the doctrine or appear to constrict the scope of the doctrine in ways incompatible with the rest of the ideas presented in this chapter. I address two such renowned examples here.

1. The non-assumption of certain pre-Anschluss Austrian debts (1938)

Austria was heavily indebted to foreign creditors at the time of its annexation by Germany in 1938.[121] A number of loans were obtained subject to various covenants designed to prevent a union of Austria with Germany.[122] Upon annexation, Germany refused to assume these on the grounds that they were contracted against the state's interest, which in their view mandated the unification. The German response to the

[120] On this line of argument, see O Lienau, *Rethinking Sovereign Debt: Politics, Reputation and Legitimacy in Modern Finance* (Cambridge, MA: Harvard University Press, 2014). On Ecuador's strong economic growth and redistribution following its rescheduling, see Ray and Kozameh, 'Ecuador's Economy since 2007'. There is even little evidence to show that President Alan Garcia's notorious decision to repudiate Peru's sovereign debt in 1984 was a significant cause of the economic turmoil that followed a few years later: see T Lothian, 'The Criticism of the Third-World Debt and the Revision of Legal Doctrine' (1995) 13 *Wis Int'l LJ* 421, 431.

[121] For the best general account of the details of the Austrian debts, see JW Garner, 'Questions of State Succession Raised by the German Annexation of Austria' (1938) 32 *AJIL* 421, 424–426. I do not, however, endorse the author's characterisation of the position of Alexander Sack and several instances of state practice at 426–431, which I believe are inaccurate to the extent they are inconsistent with the treatments given elsewhere in the present book.

[122] Foorman and Jehle, 'Effects of State and Government Succession', 22.

American complaint cited the practice of both the United States and Great Britain.[123]

Although this is a formal invocation of the doctrine, some writers refer to the position as 'legally incorrect'.[124] One of the objections to the German claim was that large portions of the debt were used for the purchase of flour, 'to relieve the food wants of the Austrian people'.[125] It is helpful to reproduce the American reply:

> It is believed that the weight of authority clearly supports the general doctrine of international law founded upon obvious principles of justice that in case of absorption of a State, the substituted sovereignty assumes the debts and obligations of the absorbed State, and takes the burdens with the benefits. A few exceptions to this general proposition have sometimes been asserted, but these exceptions appear to find no application to the circumstances of the instant case. Both the 1930 loan and the relief loans were made in time of peace, for constructive works and the relief of human suffering.[126]

The American position concedes that there have been 'asserted'[127] exceptions to the rule that debts pass on total absorption of another state, and that such exceptions include war debts and apparently subjugation debts. So while the United States disputed the facts of the case, it did not dispute the legal arguments advanced by Germany.

2. The Iran–United States tribunal award (1996)

The Iran–United States Claims Tribunal was established in 1981 to settle claims between Iranian and US nationals arising from actions taken during the 1979 Iranian Revolution.[128] It resulted from negotiations between the United States and Iran, in which each had significant bargaining power. The United States had frozen nearly US$12 billion in Iranian assets by US order, and Iran held several hundred American hostages.[129] The president terminated the relevant claims

[123] Hoeflich, 'Through a Glass Darkly', 63–64.
[124] Foorman and Jehle, 'Effects of State and Government Succession', 21.
[125] Garner, 'Questions of State Succession', 425; see also Foorman and Jehle, 'Effects of State and Government Succession', 22.
[126] Hyde, *International Law*, p. 419 (citing a Department of State Press Release of 9 April 1938, pp. 465–466).
[127] It was the US government that had asserted such an exception in the Cuban loans case.
[128] CN Brower and JD Brueschke, *The Iran–United States Claims Tribunal* (The Hague, London: Martinus-Nijhoff, 1998).
[129] Ibid., p. 5.

against Iran in US courts,[130] and the hostages were freed. Among the Tribunal's awards, at least one addressed the issue of odious debt squarely.[131]

In *United States of America v Islamic Republic of Iran*,[132] Iran contested the enforceability of a contract for the supply of military and other equipment to Iran in 1948. The 1948 contract provided that a certain line of credit be:

> earmarked for the purchase of arms and equipment in the United States . . . which are urgently required to render the Iranian Army more mobile and put it in a better position to fulfill its duty in the maintenance of law and order within Iran's borders and in defending the integrity and independence of the Country without any thought of aggression.[133]

The Tribunal found that (a) there was insufficient evidence that the loans were not beneficial to Iran, since the country was not at the time engaged in any civil or revolutionary war, thus 'it can reasonably be assumed that they, being mainly military, served the purpose of external defence of the country'[134]; (b) the Tribunal would take no stand on whether odious or subjugation debts were transferable or enforceable under international law, but to the extent that such a doctrine did exist, it was limited to cases of state succession[135]; and (c) Iran was not a case of state succession, and even if the contrary view were taken, the debts at issue were anyway not odious. Therefore, on its face, the case takes no position on the existence of the doctrine (apart from its limitation to state succession) but finds that the particular loans were not odious.

The Tribunal's finding may be criticised on several grounds. First, it apparently confuses the relationship between subjugation debts and odious debts. It treats the former as distinct from the latter, whereas under Bedjaoui's definition, which the Tribunal used to define odious debts,[136] subjugation debts were regarded as a species of odious debt. Second, the Tribunal contradicts itself by stating on the one hand that it takes no position on the doctrinal debate about odious debts, but

[130] The validity of this order was challenged and upheld in *Dames & Moore v Regan*, 453 US 654 (1981); see also *US v Sperry Corp*, 493 US 52 (1989).

[131] In fact the odious debt argument is also used to base a claim by a dissenting arbitrator in *Ina Corporation v The Government of the Islamic Republic of Iran* Case No. 161, Chamber One Award No. 184-161-1, (1985) 8 *Iran–US Claims Trib Rep* 373. The argument seemed tenuous, and was not addressed in response by any other member of the panel.

[132] 32 *Iran–US Claims Trib Rep* 164, (1996) (Chamber Two Award No. 574-B36-2 of 3 December 1996).

[133] Ibid., para. 12. [134] Ibid., para. 49. [135] Ibid., para. 54. [136] Ibid., para. 51.

that on the other it applies in cases of state succession only. Bedjaoui himself noted that the concept of regime debts was invoked often in instances where there was no state succession,[137] and Sack's doctrine also applied to changes of government. Appeals to this unreasoned aspect of the Tribunal decision are in my view appeals to unsound authority. Third, the Tribunal uses a problematic – or at any rate controversial – threshold for the concept of subjugation. There is no reason to think that there must be a war of liberation in order to trigger the doctrine's application. Such threshold was not applied in the apportionment of the Polish loans discussed above, nor was it the case in the Soviet Union or PRC's application of the doctrine, or in numerous cases of decolonisation, nor was it a necessary element of Bedjaoui's definition. Fourth, the findings of fact are questionable on their face. The finding that the funds were used to protect the country from external aggression (which was expressly declared to be an assumption of the Tribunal) flatly contradicts one of the purposes identified in the contract itself: 'maintenance of law and order within Iran's borders'. The Tribunal decision is therefore riddled with flaws. It is neither technically binding and nor is it persuasive.

E. *Defining 'Subjugation':* Jus Cogens*, Human Rights and the High Threshold*

Given the role of custom in public international law, it was necessary to survey the precedents before settling upon a general definition of subjugation. Such precedents served as the legal material from which Bedjaoui drew his own definition of 'odious debt'. Bedjaoui's notion of subjugation had a very high threshold: 'debts contracted by a State with a view to attempting to repress an insurrectionary movement or war of liberation in a territory that it dominates or seeks to dominate, or to strengthen its economic colonization of that territory'.[138] That fits most of the precedents. Bedjaoui's notion of subjugation must be read into his broader definition of 'odious debt', which, it will be recalled, comprised two headings: '(a) debts contracted by the predecessor state with a view to attaining the objectives contrary to the major interests of the successor State or transferred territory' and '(b) all debts contracted by the predecessor State

[137] Bedjaoui, *Ninth Report*, p. 68, paras. 124 and 126, 'Regime debts and odious debts could thus be regarded as practically identical.'
[138] Ibid., p. 72, para. 157.

with an aim and for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations'.[139] The first heading uses the expression 'major interests' to suggest a higher threshold, whereas the second appears to suggest a role for international law analogous to the domestic law notions of public policy discussed in chapter 4 below. And we can recall that the final version of the Convention considered state debts as those 'arising in conformity with international law'.[140] It would appear that Bedjaoui must have intended that both the type of subjugation and the breaches of international law would be serious and grave. There are sound policy reasons also behind such a high threshold. Considerable uncertainty would follow from a lower one. There are many lesser breaches of international law that may occur, sometimes inadvertently, and there must be some proportionality between the extent of illegality and the loss suffered. It cannot be that every time a state loses a case at an international human rights court, any of its notionally related debt obligations fall as well. Sabine Michalowski agrees.[141]

International law provides relevant concepts and categories that match this idea of a high threshold.[142] They can be found in the concepts of *jus cogens* and other 'grave' or 'serious' or 'flagrant' breaches of international law. *Jus cogens* norms, sometimes called peremptory norms, are those international norms that are universally agreed between states and from which no derogation, by treaty or otherwise, is permitted.[143] The International Law Commission has recently concluded that a core list of examples of *jus cogens* norms include 'the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination, apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination'.[144] Some authors

[139] Ibid., p. 74. [140] See chapter 2, section III.C.2.

[141] S Michalowski, *Unconstitutional Regimes and the Validity of Sovereign Debt: A Legal Perspective* (Hampshire: Ashgate, 2007), p. 84.

[142] The argument that follows may be read either as an interpretation of the concept of subjugation that was offered by Bedjaoui or as a new free-standing definition of 'subjugation' and 'illegality' for the purposes of the rest of the argument. I believe it expounds the ideas contained in Bedjaoui's work, but it does not matter because the concept of odious debt is not chained to the particulars of his definition.

[143] Art. 53 VCLT; A Orakhelashvili, *Peremptory Norms in International Law* (Oxford: Oxford University Press, 2008), ch.1.

[144] ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', U.N. Doc. A/CN.4/L.682 (13 April 2006) (33).

and the Restatement (3rd) of Foreign Relations law also include breaches of particular fundamental human rights, such as disappearances or prolonged arbitrary detention.[145] The Restatement also observes, echoing article 53 of the Vienna Convention on the Law of Treaties, that 'an international agreement that violates [*jus cogens* norms] is void'.[146]

It can be observed at once that virtually all forms of subjugation found in the precedents presented above fall clearly within these categories. Suppression of national liberation movements, the colonisation of Poland and (allegedly) the Hukuang Railroad bonds in China were regarded as violations of the principle of self-determination. Virtually all contemporary forms of what is alleged to be subjugation involve flagrant, notorious and widespread violations of fundamental human rights, or violations of the laws of war or crimes against humanity. And aggressive and illegal wars, such as the Iraq war against Kuwait and the Iran–Iraq war, violate the prohibition on the use of force.

The idea of using 'serious' or 'grave' breaches of even fundamental norms as a legal threshold is well established. 'Grave breaches' of the Geneva Conventions has been an established category of war crime for some time.[147] For example, grave breaches of the Fourth Geneva Convention include:

> wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.[148]

It is also common to speak even of 'serious breaches' of peremptory (*jus cogens*) norms. So the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts provides, in chapter 3, for the responsibility of states where there has been a 'serious breach of obligations under peremptory norms of general international law'. It defines, in Draft Article 40(2), a breach as 'serious if it involves a gross or systematic failure by the responsible State to fulfil the

[145] Orakhelashvili, *Peremptory Norms*, pp. 50–64. [146] Ibid.

[147] MD Öberg, 'The Absorption of Grave Breaches into War Crimes Law' (2009) 91 *Int'l Rev of the Red Cross* 163.

[148] Art. 147 of the Fourth Geneva Convention of 1949. Arts 50/51/130 of the First, Second and Third Geneva Conventions of 12 August 1949 are narrower.

obligation'. In the UK case of *Kuwaiti Airways*, which I examine further below, the House of Lords used the notion of a 'serious' or 'flagrant' or 'gross' breach of international law,[149] and it has subsequently used the notion of a 'flagrant breach' of a provision of the European Convention on Human Rights as a standard relevant in asylum law,[150] as has the European Court of Human Rights.[151]

A similarly useful concept is that of a 'reliably attested pattern of gross and systematic violations of human rights'. The expression is drawn from the UN Economic and Social Council's Resolution 1503, which created a procedure now used by the Human Rights Council for hearing complaints of that nature.[152] The Restatement (3rd) on Foreign Relations law also uses the very similar wording of 'a consistent pattern of gross violations of internationally recognised human rights'[153] in respect of what it considers to amount to a violation of customary international law (over and above any violation of applicable human rights conventions).

The substantive content of the concept of 'subjugation' can and ought to be defined by reference to these concepts. It has the advantage of marrying the precedents concerning subjugation with established and universally acknowledged forms of international legality that function analogously to domestic notions of public policy and public law. I would therefore offer the following definition of 'subjugation' for the purposes of the category presented in this chapter:

> Subjugation debts are those debts that are made for the purpose of facilitating the violation of *jus cogens* norms, commission of serious or flagrant violations of human rights, humanitarian law, or other fundamental international law principles in respect of the population of the debtor state.[154]

[149] *Kuwait Airways Corp v Iraqi Airways Co (No.6)* [2002] UKHL 19; [2002] 2 AC 883; [2002] 2 WLR 1353. The Court used the expression 'gross' ([29], [113]), 'serious' [29], 'flagrant' ([20], [107], [114]–[116], [148] and [191]) and most importantly 'clear' or 'clearly established' ([26], [28], [139], [140], [148]).

[150] *RB (Algeria) v Secretary of State for the Home Department* [2009] UKHL 10; [2009] 2 W I R 512, esp at [133]ff, [197] and [245].

[151] *Mamatkulov and Askarov v Turkey* (2005) 41 *EHRR* 494, 537–539.

[152] ECOSOC Resolution 1235 (XLII) (1967); ECOSOC 1513 (XLVIII) (1970). For a critical overview of these procedures, see H Tolley Jr, *The UN Commission on Human Rights* (Boulder: Westview, 1987), pp. 55–82; P Alston, 'The Commission on Human Rights' in P Alston (ed) *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992).

[153] *Restatement (3rd) Foreign Relations Law* §702.

[154] I have limited this definition to 'subjugation' of the population of a debtor state, but for all the reasons given, it should not matter whether the loan financed harm to the state's

This definition is more focused and legalistic than those offered by Sack and Bedjaoui, but the substantive coverage in my view is substantially the same.[155] Sabine Michalowski has examined the use of *jus cogens* norms as the appropriate definitional standard for odious debt claims in an extensive way.[156] Her basic position is nuanced, well-supported in law, persuasive and in my view wholly accurate. There is disagreement between us only on a few particulars. First, I believe the critique of the traditional doctrine of odious debt, particularly the reliance upon the principle of *pacta sunt servanda*[157], are flawed for reasons discussed in chapter 2. Second, I do not think that the *jus cogens* approach replaces other types of odious debt that I have identified and that are well-supported in international law. There is no *jus cogens* threshold for traditional war debts, illegal occupation debts or corruption debts. Third, there appears to be greater continuity between the precedents and Michalowski's approach than the organisation of her book may suggest. In my view, the violation of what are today regarded as *jus cogens* and fundamental human rights norms has very much been the concern in both the precedents and the attendant literature from the start. Fourth, I believe there is less insight to be gained from the international criminal law standards as applied in the alien tort claims cases in the United States than there is to be derived from principles of private law examined in chapter 4 of this book. Debt claims these days are for the most part civil claims under ordinary private law of certain jurisdictions. The last area of disagreement relates to the issue of fungibility, which is addressed at some length in chapter 5, section I.D.

Now we can revisit the charge that there is very meagre evidence of the doctrine of odious debt. This charge is fair if not entirely accurate in

population or any other breach of international law whether in respect of its own population or another. I leave open that question as I am concerned to fashion a definition that fits the concept at issue and as it has developed historically.

[155] Bedjaoui's classification of odious debts admittedly suggests some, unspecified difference between 'contrary to the major interests of the population' and 'not in conformity with international law'. Yet the idea of 'major interests' is not fleshed out in a way that suggests it could be anything other than a violation of the norms set out in the definition offered here. Bearing in mind the evolution of international human rights, humanitarian, and criminal law since the time in which he wrote, the distinction is still less plausible.

[156] Michalowski, *Unconstitutional Regimes and Sovereign Debt*, ch. 4. Although I came to a similar conclusion independently of Michalowski, as evident in the working paper of this article posted online in 2007, and in King, 'Odious Debts: The Terms of the Debate', 651, 658, I consider Michalowski's analysis of this linkage to be superior in form and detail. Where we agree, I happily disavow any claim to originality.

[157] See Michalowski, *Unconstitutional Regimes and Sovereign Debt*, ch. 2.

respect of how widely accepted the exact expression 'odious debt' is. But it falls flat in respect of the definition given above. These norms set out above are buttressed by an astonishingly wide array of customary international law, treaties and declarations, and are for the most part embedded in the Charter of the United Nations. Since the bulk of this notion of subjugation comprises peremptory norms in international law, it is settled law that even a treaty that conflicts with it is void.[158] And furthermore, such norms are inviolable in cases of both state succession and changes of government. They are the public policy of the international order, and it is a general principle of law that contracts that violate public policy are not enforceable.

III. Illegal Occupation Debts

There have been a number of instances in which states have refused to assume debts created in their names or in respect of occupied territory by a foreign occupying power. These debts are similar to subjugation debts, and the principle of self-determination is often implicated, but they may be regarded as worthy of consideration as a distinct type for at least two reasons. First, since the precedents involved illegal occupations, it is possible that this line of cases can be distinguished on this ground. Second, there is a presumption in cases of illegal occupation that *any* debt is not for the benefit and is against the interests of the state's population. In practice, the approach has been that the occupied territories emerge with no debts relating to the period of occupation.

The definitional thresholds for this category are relatively well established in public international law. An 'occupation' is defined in the Hague Conventions of 1907,[159] and is an integral concept in the Fourth Geneva Convention.[160] The concept of occupation has changed somewhat historically, however, in line with the notion of illegality. While well into the 1940s, the concept of occupation usually meant a brief occupation that could be contrasted with state succession, there had by the 1990s been many cases of occupations lasting for several decades. As to illegality, the

[158] Art. 53 VCLT.

[159] Hague IV, 18 October 1907, The Hague, in force 26 January 1910, Laws and Customs of War on Land, 187 CTS 227, Section III: 'Military Authority over the Territory of the Hostile State'.

[160] Geneva Convention IV Relative to the Protection of Civilian Persons in Times of War, 12 August 1949, in force 21 October 1950, 75 UNTS 87, in particular Part III, Section III: 'Occupied Territories'.

rules regarding the use of force in international law have changed considerably since the adoption of the UN Charter, now complemented by the UN General Assembly's definition of 'aggression' in international law.[161] Difficult cases will of course arise, for example, where the UN Security Council acts to confer legitimacy upon an occupation that was taken pursuant to an illegal war.[162] This is not the place to carry out an in-depth study of the concept, and as will shortly be seen, the issue is often resolved by UN Security Council and General Assembly resolutions that expressly declare specific occupations to be illegal. Since the very idea of an 'occupation' as an international law matter supposes two states, this line of precedents concerns state succession only.

A. *Opinions of Writers*

There has not been much written on the concept of illegal occupation debts. Ernst Feilchenfeld's *The International Economic Law of Belligerent Occupation* was published in the midst of World War II and addressed both the paucity of literature on the subject and some of the legal issues surrounding public debts.[163] Feilchenfeld distinguished cases of conquest and occupation, particularly 'temporary or precarious' occupations, from instances of state succession.[164] As will become evident below, this distinction is unhelpful as a guide to whether the occupying power is capable of binding the state internationally. As to the occupant's liability for public debts while in power, Feilchenfeld's review of practice seems varied and it is difficult to say that a clear rule applies. However, for Feilchenfeld, the rule is much clearer as to the occupied state's liability: 'an occupant cannot validly burden the treasury of the occupied state with new debts.'[165] For his part, Sack asserts that 'state debts are those debts contracted by a *regular* government.'[166] None of these early treatments were concerned directly with illegal occupations. Subsequent state practice supports the view that a state engaged in an illegal occupation of

[161] Definition of Aggression, UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/9631.
[162] A possible example of this type is UNSC Res 1546 (5 June 2004) UN Doc S/RES/1546 adopted unanimously and which endorsed the creation of the Interim Government of Iraq, which held power for just under a year and under which substantial economic commitments and debt negotiations were undertaken.
[163] EH Feilchenfeld, *The International Economic Law of Belligerent Occupation* (Washington, DC: Carnegie Endowment for International Peace, 1942), pp. 62–70.
[164] Ibid., p. 62. [165] Ibid., p. 69.
[166] Sack, *Les effets des transformations des États*, pp. 6ff. [emphasis added].

another cannot bind that other state to a public debt obligation, at least absent special circumstances.

B. *Yugoslavia's Responsibility for World War II Croatian Debts (1956)*

In *Postal Administration of Portugal v Postal Administration of Yugoslavia*,[167] the Portuguese Postal Administration challenged by way of arbitration its counterpart in Yugoslavia for debts relating to postal charges (reply coupons and transit charges) incurred by the State of Croatia for acts performed in 1941 and 1943. The State of Croatia had been established by Nazi Germany after its invasion of Yugoslavia on 18 April 1941. The Portuguese administration claimed that the amount owing was 'incontestable and the fact that the debtor, at the time when the debt arose, was governed by authorities different from the present ones could not be taken into consideration ... Yugoslavia had never denied that [Croatia] formed an integral part of Yugoslav territory.'[168] Yugoslavia replied that the debts were created by 'an artificial creation of the occupying power' and that 'what was in the interest of the occupying power was not in that of the occupied people'.[169] It went on to argue that '[t]he debts in question were not created in the interest of Yugoslavia, a country whose people at the time, were fighting hard for their national liberation.'[170] Yugoslavia referred to the creditors as 'collaborators'.[171] The arbitrators found, inter alia, that there was no uncontested rule of international law settling the matter, and that it was beyond its competence as arbitrators of postal disputes to resolve such a question. The claim was thus denied. Nevertheless, the arbitration remains of significance as a medium through which state practice was articulated.

C. *Ethiopia's Responsibility for Italy's Debts (1957)*

Italy invaded Ethiopia and annexed the country on 9 May 1936. The invasion was in violation of the Italo-Ethiopian Treaty of 1928, the Covenant of the League of Nations and the Pact of Paris, and was unanimously condemned by the League of Nations on 7

[167] (1956) 23 *ILR* 591.
[168] *Postal Administration of Portugal* v *Postal Administration of Yugoslavia* (1956) 23 *ILR* 591, 592.
[169] Ibid., pp. 593–594. [170] Ibid., p. 594. [171] Ibid.

October 1936.[172] It remained as a colonial power until ejected by Allied forces on 1 May 1941. The *Franco-Ethiopian Railway Company Claim*[173] involved a claim by France against Italy before the Franco-Italian Conciliation Commission in respect of damage sustained by the company at the hands of the Italian military. Although the Tribunal was principally concerned with Italy's responsibility as a belligerent occupier for damage to enemy property, it also addressed the issue of whether Ethiopia could be made responsible for the damages sought. France submitted the following argument:

> It was generally admitted that liability for debts contracted for the benefit of ceded territory passed to the successor State[. . .]; but debts contracted by the ceding State for the purposes of making war or of increasing the amount of territory previously annexed and subsequently liberated, could not bind the successor (or restored) State. Ethiopia could not be charged with Italian expenditure towards establishing her domination over Ethiopian territory.[174]

Thus France's submission was that debts benefitting the territory do pass, but those used to establish domination do not. The Tribunal did not express a view on this argument and ultimately rested its finding on the broader claim that there was no settled rule of repayment.[175]

D. Baltic Republics after the Dissolution of the USSR (1991)

The Baltic republics of Latvia, Lithuania and Estonia were part of the Russian Empire until World War I. Their independence was formally recognised in 1920. They remained independent until annexed by the Soviet Union in 1940. In the spring of 1990, Lithuania, Latvia and Estonia were the first republics to declare independence from the Soviet Union and reinstate their previous constitutions.[176] Following the dissolution of the Soviet Union, negotiations on the apportionment of debt among the previous member states of the union took place in two initial steps. The first involved a conference held in Moscow, 27–28 October 1991, which concluded with the adoption of a memorandum of understanding on debts to foreign creditors of the Union of Soviet Socialist Republics

[172] For an analysis of the legal status of the invasion, see JW Garner, 'Non-recognition of Illegal Territorial Annexations and Claims to Sovereignty' (1936) 30 *AJIL* 679.
[173] (1957) 24 *ILR* 602. [174] Ibid., p. 604. [175] Ibid, p. 629.
[176] The details of the apportionment of the debt of the former Soviet Union are well summarised in P Williams and J Harris, 'State Succession to Debts and Assets: The Modern Law and Practice' (2001) 41 *Harvard Int'l LJ* 355, 366ff.

and its successors.[177] The Baltic states were the only of the former Soviet republics not to attend this meeting, and they did not sign the memorandum. The various states present agreed upon assuming an equitable share of the USSR's debt, but the creditors present pressured all states to agree to joint and several (i.e. individual) liability for the entire amount. They reluctantly acceded. The memorandum also expressed the debtors' commitment to negotiating the same terms with the absent Baltic states.[178]

The next step was the negotiation of the Treaty on Succession with Respect to the State Foreign Debts and Assets of the Soviet Union, concluded on 4 December 1991 between eight of the states, but setting forth an 'aggregative index' for apportioning the debt between *all* former republics. Some of the non-signing states refused to accept their portion of the debt allocation. Ukraine, for instance, objected to the method used for apportionment. However, the Baltic republics were insistent that they would refuse to recognise any debts of the Soviet Union because they viewed their annexation in 1940 as illegal.[179] This view was communicated to the Soviet Union, as well as to US state officials in separate negotiations.[180] The debt was not apportioned. The illegality of the annexation and the characterisation of Soviet presence as an illegal occupation notwithstanding its de facto authority for over fifty years have recently been restated at greater length.[181] On any way of looking at this case, then, it is state practice concerning the refusal to recognise either an illegal occupation debt or a subjugation debt.

E. Eritrea's Responsibility for Ethiopia's Debts (1993)

It has been claimed by some that prior to the process of colonisation begun by Italy in 1882, the pre-colonial history of the territory now called Eritrea is not one that supports what has traditionally been defined as

[177] Ibid. pp. 369–370. [178] Ibid, p. 370.

[179] Williams and Harris, 'State Succession to Debts and Assets', 370. See also L Love, 'International Agreement Obligations after the Soviet Union's Break-Up: Current United States Practice and Its Consistency with International Law' (1993) 26 *Vanderbilt Journal of Transnational Law* 373, 398, 402–403.

[180] See Love, 'International Agreement Obligations', 398, 402–403.

[181] L Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR, a Study of the Tension between Normativity and Power in International Law* (Boston: Martinus Nijhoff, 2003). See also RA Vitas, *The United States and Lithuania: The Stimpson Doctrine of Nonrecognition* (New York: Praeger, 1990).

nationhood.[182] However, it has been recognised by different writers that Eritrea formed a distinctive culture and identifiable borders under the period of Italian colonisation.[183] After the Allies wrested possession of the territory from Italy on 8 April 1941, the territory was placed under British Military administration. Its status was finally determined by UN General Assembly Resolution 390 in 1950, which designated Eritrea as an 'autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown'.[184] The decision of the General Assembly came after several years of diplomatic negotiations and consultations with the Eritrean people, during which time the population proved deeply divided on the question of whether to join Ethiopia or assume full independence.[185] Regardless, Ethiopia gradually failed to abide by the federalist arrangement contemplated by the UN mandate between 1952 and 1962. In 1962, Ethiopia formally annexed Eritrea and made it its fourteenth province.[186]

A number of Eritrean and other scholars view the Ethiopian failure to abide by the terms of the federation and the annexation to be itself an illegal act.[187] However, it was not widely condemned at the time for a complex host of geopolitical reasons, including US support of Ethiopian rule and African discouragement of secessionist struggles.[188]

[182] R Bereketeab, *Eritrea: The Making of a Nation 1890–1991* (Uppsala: Uppsala University, 2000) (doctoral dissertation, ISBN 91-506-1387-1).

[183] Ibid., p. 106. [184] UNGA Res 390 (V) (2 December 1950), para. 2.

[185] R Iyob, *The Eritrean Struggle for Independence: Domination, Resistance, Nationalism 1941–1993* (Cambridge, New York: Cambridge University Press, 1995), ch. 4.

[186] Ibid., p. 96.

[187] The most influential is BH Selassie, *Eritrea and the United Nations* (Lawrenceville NJ: Red Sea Press, 1989), p. 54 (founding the illegality on the breach of the UN resolution terms in 1962, calling it an 'illegal, occupationist colonial regime'); see also R Pateman, *Eritrea: Even the Stones Are Burning* (Lawrenceville, NJ: Red Sea Press, 1990). See also AM Babu, 'The Eritrean Question in the Context of African Conflicts and Superpower Rivalries' in L Cliffe and B Davidson (eds.), *The Long Struggle of Eritrea for Independence and Constructive Peace* (Nottingham: Spokesman, 1988), p. 47, 50; Iyob, *The Eritrean Struggle*, finds the 'colonialism' analysis weak for its failure to account for the nuances in the relationship between the principles of self-determination and territorial integrity.

[188] See generally, Selassie, *Eritrea and the United Nations*; Babu, 'The Eritrean Question'; Iyob, *The Eritrean Struggle*, ch. 1. A helpful quotation can be found in American Secretary of State John Foster Dulles's speech to the UN Security Council in 1952: 'from the point of view of justice, the opinions of the Eritrean people must receive consideration. Nevertheless the strategic interest of the United States in the Red Sea basin and considerations of security and world peace make it necessary that the country has to be linked with our ally, Ethiopia,' cited in BH Selassie, 'From British Rule to Federation to Annexation' in B Davidson, L Cliffe, and BH Selassie (eds.), *Behind the War in Eritrea* (Nottingham: Spokesman, 1980), p. 32, 39.

The Ethiopian position was also claimed by some to be 'not entirely without legal basis'.[189] The present chapter takes what appears to be the legal view and motivating animus of the independence struggle, namely, that the 1962 annexation was illegal. Were this view rejected, this example of state practice would also become one of refusal to recognise subjugation debts rather than illegal occupation debts.

A war of independence was fought between 1962 and 1991, after which Eritrea emerged as a sovereign state. The UN Observer Mission to Verify the Referendum in Eritrea was established in 1992 and it formally and without reservation endorsed the process in which 99.8 per cent of those polled chose independence.[190] Upon independence, Eritrea appears to have assumed none of Ethiopia's debt.[191]

F. Namibia's Responsibility for South Africa's Debts (1994)

In 1915, South Africa invaded what was then called German South West Africa in coordination with Britain's war against Germany.[192] It swiftly took control of the country. In 1920, the League of Nations was persuaded by Europeans settled in South West Africa that the country was not prepared for independence, and the League thus established a South African mandate in South West Africa. After World War II, the League's mandate system was converted into the trusteeship system under the newly formed United Nations, with the express goal of decolonisation. The new system was more vigorous at monitoring the administering powers, something South Africa refused to accept.[193] When the

[189] JH Spencer, *Ethiopia: The Horn of Africa and US Policy* (Institute for Foreign Policy Analysis, 1977), p. 31. Selassie suggests Spencer was an apologist, pointing to his role as US advisor to Ethiopia.

[190] Iyob, *The Eritrean Struggle*, p. 140.

[191] *Country Profile: Ethiopia, Eritrea, Somalia and Djibouti* 1993–1994 (London: Economist Intelligence Unit, 1994), p. 47. The same is confirmed by the reports for 1994–1995, and 1996–1997. The 1993–1994 report does mention a Relief and Rehabilitation Programme for Eritrea loan obtained from the World Bank's International Development Association by Ethiopia in 1993, a seemingly non-odious loan.

[192] See DL Sparks and D Green, *Namibia: The Nation after Independence* (Boulder, CO: Westview Press, 1992), ch. 1, for a brief history. See also AD Cooper, *The Occupation of Namibia: Afrikanerdom's Attack on the British Empire* (Lanham, MD: University Press of America, 1991); R Dreyer, *Namibia and Southern Africa: Regional Dynamics of Decolonization 1945–90* (London: Kegan Paul International, 1994); P Hayes, J Silvester, M Wallace and W Hartmann, *Namibia under South African Rule: Mobility and Containment 1915–1946* (Athens, OH: Ohio University Press, 1998).

[193] Sparks and Green, *Namibia*, pp. 15–16.

Trusteeship Council pressed South Africa to put the territory under UN trusteeship, it refused.[194] The mandate was officially terminated in 1966 by UN Security Council Resolution 276, after which point the occupation was formally recognised as illegal under international law. The illegality of the occupation was further confirmed by the ICJ[195] and further UN Security Council resolutions.[196] A war of liberation was fought from 1966 until 1990, when South Africa eventually agreed to withdraw. Independence was declared in 1990.

After the war, it appeared that certain Namibian debts to South Africa continued to be recognised by both nations. This was explicable largely by the fact that the country's entire economy and infrastructure were at the time geared towards commerce with South Africa. Despite the historical record, the country had little choice but to do business with its former oppressor.[197] Yet on 6 December 1994, Nelson Mandela confirmed an agreement assuring not only that Namibia's entire debt to South Africa would 'not be claimed', but that the remaining South African state property in Namibia would be transferred to it.[198] South Africa also assumed the payment of liabilities to private creditors. In total, the debt deal resulted in South Africa assuming between N$700 m– N$800 m (US$192– US$220 million) of Namibia's external debt, leaving it with a remainder of approximately N$50 m–N$60 m.[199]

This was not a clear precedent, but it appears that the best interpretation of the practice as between the states is that South Africa recognised

[194] Ibid., p. 16.

[195] *Legal Consequences for States of the Continued Presence of South Africa in Namibia, notwithstanding Security Council Resolution* (Advisory Opinion) [1971] ICJ Rep 78. See also R Higgins, 'The Advisory Opinion on Namibia: Which UN Resolutions Are Binding under Article 25 of the Charter?' (1972) 21 *Int'l & Comp L Q* 270.

[196] C Quaye, *Liberation Struggles in International Law* (Philadelphia: Temple University Press, 1991), p. 128.

[197] L Cliffe, R Bush and J Lindsay, *The Transition to Independence in Namibia* (Boulder: Lyenne Rienner Publishers, 1994), pp. 231–235 (showing that it had virtually no trading or transportation links with other nearby countries with whom it had cultural similarities, and no local black business elite, since the independence movement was largely working class and rural). To a similar effect, see, NK Dugal (ed.), *Economic Development Strategies for Independent Namibia* (Lusaka: United Nations Institute for Namibia, 1985), pp. 24–25.

[198] *Country Report: Namibia, Swaziland* (1st quarter, Economist Intelligence Unit, 1995) 26. The exchange rate is given as N$3.643 for US$1.

[199] *Country Report: Namibia, Swaziland* (3rd quarter, Economist Intelligence Unit, 1995) 20. The terms were ultimately settled in a treaty, namely, the Bilateral Agreement Concerning Debt, dated 27 March 1997.

that its claims were either immoral or illegal or both due to the occupation and domination of Namibia by the Apartheid government.

G. *Timor-Leste's Responsibility for Indonesian Debts (1999)*

The Portuguese began trading with the island of Timor in the early sixteenth century and later colonised it.[200] The island was divided in 1859, after skirmishing between the Dutch and Portuguese resulted in a treaty to that effect. The Dutch-controlled West Timor developed its own social character and customs and was eventually transferred to Indonesia upon its independence after World War II.[201] East Timor, however, remained under Portuguese control until it was invaded by Indonesia in 1975. The invasion took place as the country was preparing for transition from colonial rule to home rule, and local elections had established broad support for the formerly clandestine independence group that was legally recognised in 1974, namely, Fretilin.[202] Portugal withdrew its administration from the island, acquiesced in Indonesian rule, and refused to give recognition to the declaration made by Fretilin on 28 November 1975 that there was a new, Democratic Republic of East Timor. Throughout the occupation, almost universally regarded as illegal,[203] Portugal remained legally recognised by the United Nations as the legitimate administrative authority in East Timor.[204] Approximately 200,000 Timorese, constituting one-third of the pre-invasion population, died through the military aggression of the occupiers.[205] On 30 August 1999, a UN-supervised referendum confirmed overwhelming support for independence from Indonesia, notwithstanding extreme violence from pro-Indonesian militias, which displaced some 300,000 people and destroyed much of the country's

[200] See generally P Hainsworth and S McCloskey (eds.), *The East Timor Question: The Struggle for Independence from Indonesia* (London, New York: IB Tauris Publishers, 2000), esp. S McCloskey, 'Introduction: East Timor – From European to Third World Colonialism', pp. 1–16.

[201] McCloskey, 'The East Timor Question', p. 2.

[202] Ibid., 2–3. (The Revolutionary Front for the Liberation of East Timor).

[203] See UNGA Res 3485 (XXX) (1975) GAOR 30th Session 118 and UNGA Res 31/53 (1976) UN Doc A/Res/31/53, as well as UNSC Res 384 (22 December 1975) UN Doc S/Res/384 and UNSC Res 389 (22 April 1976) UN Doc S/Res/389. See also Quaye, *Liberation Struggles in International Law*, pp. 180–181; RS Clark, 'The Substance of the East Timor Case in the ICJ' in *International Law and the Question of East Timor* (London, Leiden: Catholic Institute for International Relations/International Platform of Jurists for East Timor, 1995), p. 243. See also *The Case Concerning East Timor (Portugal v Australia)*, (1995) ICJ Rep 1.

[204] *The Case Concerning East Timor*, 3.

[205] McCloskey, 'The East Timor Question', p. 4.

infrastructure.[206] East Timor emerged debt-free from this illegal occupation.[207] It was a clear violation of national self-determination.[208]

H. *Illegal Occupation Debts and Public Benefit*

The illegality of belligerent occupation is now firmly entrenched and it accounts for a variety of post-war state practice relating to the non-apportionment of debts after a period of occupation. The rule may be restated as follows: debts contracted by an illegal occupying power will be odious for the occupied territory and will not bind it. In state practice, there was no distinction between beneficial and non-beneficial debts that were contracted under illegal occupation. The presumption, it appears, was that all were considered non-beneficial.

It may be possible to argue on equitable grounds that there ought to be some qualification that would render this state practice consistent with the rest of the doctrine of odious debts: that if the creditor can show that either (1) the debts at issue were obtained with the consent of the occupied people, or (2) for their benefit, the debts should be enforceable. Such a scenario, for instance, is conceivable in the situation of a long-term occupation (e.g. Palestinian Occupied Territories) or in a country briefly occupied after a military conflict and in the midst of transitional arrangements (e.g. Iraq after the 2004 US and UK invasion). However, proving legitimate consent would be extremely difficult, and it seems like the prevailing national sentiment upon liberation will be that any assumption of previous financial liabilities must be voluntary.

IV. Corruption Debts

Corruption debts are those debts procured through bribery or corruption of a state representative, or those that are knowingly provided for the

[206] McCloskey, 'The East Timor Question', p. 4; MG Smith, M Dee, *East Timor's Journey to Freedom* (Boulder, CO: Lynne Reiner Publishers, 2003), p. 44. The CIA put the estimated number of refugees at 300,000, CIA Factbook: Timor Leste, available at <www.cia.gov/library/publications/the-world-factbook/geos/tt.html>, accessed 22 July 2015.

[207] *Country Report: East Timor 2004* (Economist Intelligence Unit, 2004) 24, makes no mention of external debt.

[208] Cheng, 'Renegotiating the Odious Debt Doctrine', 36, draws a different conclusion regarding the case of East Timor. However, he does not examine the case of debt, but rather the situation regarding a treaty obligation (the Timor Gap Treaty, between Indonesia and Australia), one which East Timor had every interest in maintaining, in suitably altered form.

personal enrichment of public officials (indirect bribery). Several proponents of the doctrine of odious debts, including Sack, identify debts that were used to bribe or otherwise enrich heads of state at the expense of the population as examples. Yet although such debts meet with Sack's definition, they differ in important ways from subjugation debts and are less controversial. They are widely regarded as illegal under the domestic private law of most states, even though until very recently bribery of public officials in developing countries was not only tolerated, but even tax-deductible in many rich countries.[209] Corruption debts are also more easily defined and benefit from a rich, if recent, international and domestic jurisprudence. Despite these differences, it is equally obvious that corruption debts have always been conceived as a central case for odious debts by Sack and those coming after him. The case law that has settled the question of their enforceability in recent years is recent, and is illustrative of how normative arguments and domestic law analogies have influenced the growth of international commercial law and practice in this area.

A. Conventions and Declarations

The Vienna Convention on the Law of Treaties has long acknowledged that corruption vitiates consent to be bound by a treaty:

> **Article 50**
> **Corruption of a representative of a State**
>
> If the expression of a State's consent to be bound by a treaty has been procured through the corruption of its representative directly or indirectly by another negotiating State, the State may invoke such corruption as invalidating its consent to be bound by the treaty.

Though this Convention would not apply to private agreements, and probably not commercial agreements between states or states and multilateral organisations, it is illustrative in recognising that corruption can invalidate even a treaty, and that there is a distinction between the state and its representative on the international plane.

There has been a profusion of international conventions and declarations establishing regimes for the criminal or civil sanctioning of corrupt practices: the Inter-American Convention against Corruption (1996); the

[209] See Organisation for Economic Cooperation and Development, 'Recommendation of the Council on Tax Deductibility of Bribes to Foreign Public Officials' (April 1996) C/M (96)8/PROV.

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997), the Council of Europe Conventions on Corruption (1999), the African Union's Convention on Combating and Preventing Corruption (2003) and now the UN Convention against Corruption (2005). These instruments have been widely ratified.[210] They obligate states parties to make corruption of a state representative a domestic criminal offence, and also to take further measures. As is discussed further in the *World Duty Free* case, these treaties are valuable sources of law for assisting in defining the content of transnational public policy, a norm conditioning the enforceability of agreements to which international law applies.[211]

B. *Opinions of Writers and General Principles of International Law*

Long before the conclusion of the measures just mentioned, it was recognised by writers that for a debt to be enforceable, it must be validly created under the domestic law applicable to the contract. There has traditionally been widespread agreement among commentators that fraud and absence of authorisation (i.e. ultra vires acts) render sovereign lending contracts unenforceable.[212] Even Feilchenfeld, who vigorously advocated a rule of maintenance for public debts in state succession, observed that debts must be duly authorised and are not enforceable where they have 'violated rules

[210] See A Posadas, 'Combating Corruption under International Law' (2000) 10 *Duke J Comp & Int'l L* 345 (for a discussion of the UN, OECD and OAS legal initiatives to combat corruption); JP Wesberry Jr, 'International Financial Institutions Face the Corruption Eruption' (1998) 18 *Nw J Int'l L & Bus* 498 (for a discussion of the World Bank's change in policy regarding its previous refusal to acknowledge corruption); B Zagaris and S Lahkani Ohri, 'The Emergence of an International Enforcement Regime on Transnational Corruption in the Americas' (1999) 30 *Law & Pol'y Int'l Bus* 53 (for a discussion of the 1996 Inter-American Convention on Corruption and a comparison of it to the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions); SR Salbu, 'A Delicate Balance: Legislation, Institutional Change, and Transnational Bribery' (2000) 33 *Cornell Int'l LJ* 657 (for an evaluation of legislative vs institutional methods of combating corruption) For the situation under Bilateral Investment Treaties, see J Webb Yackee, 'Investment Treaties and Investor Corruption: An Emerging Defense for Host States?' (2011–12) 53 *Virginia J Int'l L* 723.

[211] See section IV.C.3 below, and chapter 4 generally.

[212] Sack, *Les effets des transformations des États*, pp. 24–25; CC Hyde, 'The Negotiation of External Loans with Foreign Governments' (1922) 16 *AJIL* 523; O'Connell, *State Succession*, p. 250 'Nor are grants obtained by fraud to be considered acquired rights'); see also DP O'Connell, *International Law*, 2nd edition, 2 vols. (Stevens, 1970), vol. I, p. 378 ('It is . . . necessary that the right be properly vested under the municipal law of the predecessor State and sufficiently evidenced').

concerning the contents and purpose of debts made by the law under which it was to be created, such as, for instance, debts the contracting of which was deemed to be incompatible with public morals or with public order'.[213] This would also appear to follow from the requirement to exercise one's rights in good faith recognised in international law. So much is explained by Jacques Barde, who concludes that, as a matter of general international law, 'a claim tainted with bad faith, or by illicit or illegal means with respect to the internal law or international law cannot give rise to an acquired right'.[214] These older authorities merely confirm the pedigree of an idea that has been recognised by modern writers and endorsed by international arbitration tribunals.[215]

A related but potentially distinct phenomenon is contracts signed or concluded with an agent acting in excess of authority. Writers have long accepted that state representatives must be duly authorised to conclude the debt agreement and issue bonds. In an early discussion, Charles Cheney Hyde was clear on this point:

> An external bond issue must be valid as a primary condition of acceptability. Validity, so far as it concerns the conduct of the borrower, is governed by the laws and constitution (if any) of the borrowing state. Their requirements must be fully met. The lender must, therefore, satisfy itself as to compliance.[216]

Hyde furthermore acknowledges that a mere representation that local law has been complied with and the opinion of local counsel will not necessarily satisfy the lender's duty. Rather, it is necessary that the lender use 'every available means' to ensure that the governmental representations and local opinions as to authority are accurate.[217] It must be acknowledged that general international law has for some time attributed responsibility to states even for the ultra vires acts of their officials.[218] Yet states will only be responsible for acts of officials ostensibly within their

[213] Ibid., p. 685.
[214] J Barde, *La Notion de Droits Acquis en Droit International Public* (Paris: Publications Universitaires de Paris, 1981), p. 166 (my translation); see generally pp. 142–167.
[215] A Sayed, *Corruption in International Trade and Commercial Arbitration* (New York: Kluwer Law, 2004); on the famous 'Lagerfren Award' see J Gillis Wetter, 'Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No 1110' (1994) 10 *Arb Int'l* 277, 287ff.
[216] Hyde, 'The Negotiation of External Loans with Foreign Governments', 525.
[217] Ibid., p. 526. See further the discussion of agency law in Chapter 4, section III.C.
[218] Crawford, *Brownlie's Public International Law*, pp. 549–551; see also esp Michalowski, *Unconstitutional Regimes and Sovereign Debt*, pp. 177–186.

authority or its general scope,[219] and case law on corruption examined further below and in chapter 4, section III.C suggest that tribunals will be slow to find the receipt of bribes and other acts of corruption to be within ostensible authority. Principles of law observed in the United States and the United Kingdom support a similar position. In the United Kingdom, no government employee can bind the Crown to a contract concluded outside an official's actual or ostensible authority,[220] though a creditor may recover if authorised by statute.[221] The position in US law has been summarized succinctly as follows [222]:

> The power of the legislature to issue securities or obligations is plenary except as limited by the Constitution. The executive branch of the state government has no such right, in the absence of either constitutional or statutory provisions authorizing it; and when such powers are given, either by the Constitution or by act of the legislature, they are confined to the particular case so authorized.

Although the US federal power to borrow is wide and unqualified in the Constitution, courts have added an enforceable 'public purpose' requirement as a matter of implied constitutional limitation.[223]

C. *Illustrations*

Given the recent but now widespread agreement on the principle that corruption debts are unenforceable, it is not necessary to survey a broad range of precedents. However, three dimensions of corruption debts may be illustrated by way of example.

1. Ultra vires debts: Southern US States (1836–1880)

Litigation of state debts has occurred for some time. Sack considered certain debts repudiated by a few southern US states on the basis of fraudulent or ultra vires activities by the state representatives to have been odious.[224] North Carolina, South Carolina and Mississippi all had

[219] Crawford, *Brownlie's Public International Law*, pp. 549–551.

[220] *Attorney-General for Ceylon v AD Silva* [1953] AC 461 (PC); *Re Selectamove Ltd.* [1995] 2 All ER 531 (CA). See also GH L Fridman, *The Law of Agency*, 5th edition (London: Butterworths, 1983), p. 382.

[221] See e.g. s6 of the UK's Local Government Act 2003: 'A person lending money to a local authority shall not be bound to enquire whether the authority has power to borrow the money and shall not be prejudiced by the absence of any such power.'

[222] 64 Am Jur 2d Public Securities and Obligations § 37 (2014).

[223] Ibid, §§ 88–91.

[224] Sack, *Les effets des transformations des États*, pp. 25, 158. 'Les cas de répudiation de certains emprunts par divers États de l'Amerique du Nord. L'une des principales raisons

such experiences between 1800 and 1880. These may be regarded as instances of state practice relating to sovereign debt, because the individual US states enjoy the 'privilege of sovereignty'.[225] Although initially states were liable for their debts to private parties from other states,[226] this was curtailed by the Eleventh Amendment to the Constitution, further litigation,[227] and ultimately by the Supreme Court finding that US states are entitled to the same immunity from suit as foreign states are under international law in actions to collect on debts.[228]

Between 1848 and 1870, the state of North Carolina issued a series of state bonds.[229] Although most of the debt was contracted in order to construct rail and roadways, and some to repay previous debts, subsequent investigations revealed that the debts were procured in a reckless manner, and that the funds were misappropriated. Bribery and corruption played an important role in the scandal.[230] After this investigation, a series of legislative acts were passed in which payment upon some of the bonds was restricted. The bondholders applied to a court to have payment compelled. The Superior Court of Wake County held that the bonds were void because they were issued in violation of the state constitution.[231]

justifiant ces répudiations a été le gaspillage des deniers empruntés . . . [Les] opérations louches ont été souvent le résultat d'un accord entre des membres indélicats du gouvernement et des créanciers malhonnêtes.'

[225] *Cunningham v Macon & Brunswick R. Co.*, 109 US 446, 451 (1883). See further HA Wilkinson, *The American Doctrine of State Succession* (Baltimore, MD: Johns Hopkins Press, 1934) 78 (citing argument by counsel for the US to the British–American Claims Commission: '[Texas] is, for the purpose of fulfilling these obligations, as clearly responsible for their payment by the law of nations, by her separate and distinct organization, and by her solemn agreement with the United States, as she ever was, and is fully able to discharge them').

[226] *Chisholm v Georgia*, 2 US 419 (1793).

[227] *Hans v Louisiana*, 134 US 1 (1890) (granting immunity from suit by resident of the debtor state).

[228] *Principality of Monaco v Mississippi*, 292 US 313 (1934). This accords with the views of the framers: WC Coleman, 'State as Defendant under the Federal Constitution: the Virginia-West Virginia Debt Controversy' (1917–1918) 31 *Harv L Rev* 211.

[229] For a comprehensive summary of the events surrounding the North Carolina debt issue, see RC McGrane, *Foreign Bondholders and American State Debts* (New York: MacMillan, 1935), pp. 334–344.

[230] McGrane, *Foreign Bondholders*, p. 335, where the author refers to the Railroad lobbyists as 'plunderers'.

[231] *Baltzer v State*, 104 N C 265, 10 S E 153, 154 (N C 1889) ('It is conceded that these bonds, and all the state bonds so issued, were unwarranted by the constitution of this state, and are void.'); affirmed on other grounds *Baltzer* v *North Carolina*, 161 US 240 (1896).

In South Carolina, loans were contracted between 1861 and 1863 for a variety of purposes, and after the state defaulted, an investigation revealed that many of the debt transactions were illegal and fraudulent.[232] The legislature attempted to appease doubts as to the validity of the debt by issuing a declaration in 1872 that all debts listed in the state treasurer's report are valid and legal. However, persistent default was followed by a subsequent rescheduling and reduction of the debt, which was challenged successfully by some creditors.[233] Nevertheless the problems of repayment continued, and a court of claims was established with the mandate of examining the legality of the debts. The Supreme Court of the state was finally called upon to decide the issue, and it found that some bonds were illegal because they were issued 'without any authority whatsoever'.[234] A commissioner was subsequently appointed to resolve the outstanding issues, and his report found $1,126,762.99 to be invalid, while $4,479,048.05 was held to be valid.[235]

The state of Mississippi went through a similar crisis.[236] During the 1830s, the state issued bonds in order to finance the Union Bank, which was chartered by the state in 1837. However the sale of the bonds violated the instructions given to the bank's agents, and the governor of the state later alleged that the bonds were illegal and sold fraudulently.[237] He recommended repudiation to the legislature, which refused. Shortly thereafter, a newly composed legislature decided in favour of repudiation. This decision was reached notwithstanding the opinions of the courts, whose independence in the matter has been challenged.[238] Thus the bondholders were never fully repaid. Substantially similar events occurred in Florida, which also never repaid the debt.[239]

These cases of domestic repudiation do not involve an invocation of the doctrine of odious debts, but are still viewed by Sack as supporting the principle. They also illustrate the link between ultra vires debts and corruption. However, the idea that ultra vires debts might not bind appears at first to be inconsistent with the holding in the *Tinoco* case

[232] McGrane, *Foreign Bondholders*, pp. 344–354. [233] Ibid., p. 351. [234] Ibid., p. 353.
[235] Ibid., p. 354. [236] Ibid., pp. 193–222. [237] Ibid., p. 200. [238] Ibid., pp. 213–214.
[239] WB English, 'Understanding the Costs of Sovereign Default: American State Debts in the 1840's' (1996) 86 *Am Econ Rev* 259, 267. (The author remarks, relying on McGrane's study, that the non-compliance with state law served as a 'pretext for repudiation' both with Mississippi (266) and Florida (267)). Sack also mentions, *Les effets des transformations des États*, p. 25, that in most cases, arguments about illegality were also simple pretexts. However, he shows that for certain states, notably Arkansas, Georgia and South Carolina, writers like Gaston Jèze were without doubt as to the illegality of the conditions of their issuance.

(discussed below), which found that an unconstitutional, de facto government can bind a state in international law. In my view, the two lines of authority may be reconciled in principle. The policy concern behind the *Tinoco* case is that there is a need for certainty in international law as to who is empowered to bind the state in international relations. With the frequency of revolution and unconstitutional changes of government, the concern that it cannot hinge on domestic legal formalities appears superficially sound. At the same time, it cannot be the case that any public official acting in flagrant violation of local public law can bind the state to an onerous sovereign contract or treaty. In my view, it is appropriate to recognise a difference between (a) a government that obtained power through an unconstitutional means but thereafter followed the applicable legal procedures in force within the new legal system, and (b) a government agent who ignores legally applicable procedures altogether when purporting to bind the state to sovereign obligations. The first recognises a change in the legal order, but proper conformity with the law in the new system.[240] It also meets the policy concern behind the *Tinoco* case, and indeed explains the interesting holding in that very case – that despite having authority in a general sense to bind the state, those debts in particular would not bind.[241] The second is a scenario which departs fundamentally from the very crudest notions of the rule of law, and is in all likelihood a species of fraud that ought not be sanctioned by any legal system.

2. Personal enrichment: the Tinoco arbitration (Costa Rica v Great Britain) (1923)

In the very significant *Tinoco Arbitration* (Great Britain v Costa Rica),[242] the term 'odious debt' was not used in this instance, and Sack appears to have overlooked the case's relevance despite citing the case elsewhere.[243]

[240] This situation does raise a profound question about when a legal system is in force. I follow HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), ch. 7, which directs the analysis to the question of which rule of recognition was accepted and employed by public officials in practice to identify the sovereign authority to issue binding primary law.

[241] See chapter 4 for analysis.

[242] *Tinoco Arbitration (Great Britain v Costa Rica)* (1923) 1 *RIAA* 369, reprinted in (1924) 18 *AJIL* 147, 149–154.

[243] It is notable that Sack was fully aware of the *Tinoco* case and relied on it elsewhere in his book (*Les effets des transformations des États*, p. 11) to reinforce the idea that de facto authorities can bind the state. It is puzzling why he did not use the case to buttress his extensive arguments, relying also on Jèze, that public loans must be for the public benefit

It is nonetheless commonly cited as an important precedent in the odious debt literature by advocates and critics alike.[244]

Then Secretary of War for Costa Rica, Federico Tinoco, overthrew the Government of Costa Rica in January 1917. He later held an election to ratify the revolution, in which support for his government may have been legitimate. By August 1919, he left the country, with his government falling in September. In June and July 1919, the Banco Internacional de Costa Rica issued several bills of credit to the Royal Bank of Canada, on the strength of which the Royal Bank paid several cheques drawn by the Tinoco government. As found by the Tribunal, the funds were used for the personal enrichment of Tinoco and his brother, and for no public purpose. When Tinoco's government fell in September of that same year, the restored Constitutional Congress legislatively annulled all state contracts with private persons made during Tinoco's rule.[245]

The details of the transactions are somewhat complex, but essentially amount to the following.[246] Despite its imminent downfall, the Tinoco government provided by law in late June and early July 1919 that certain notes and bonds be issued. It was common ground that the bonds were irregular in nature, and the Royal Bank of Canada sought and received assurance and confirmation of an oral agreement as to the applicable interest rate of 10 per cent by way of a written letter from the Minister of Finance.[247] The bonds were issued by the domestic bank and paid by the Tinoco government into the Royal Bank of Canada as security for access to a revolving line of credit. The arbitrator ultimately found that the various deposits and cheques were all intended to constitute one transaction, namely, the payment of $200,000 to Federico Tinoco and his brother Jose Joaquin Tinoco.[248] The purpose of the payment of this sum was recorded in a journal entry as follows: 'to [Federico Tinoco] for expenses of representation of the Chief of the State in his approaching trip abroad, and [Jose Joaquin Tinoco], [the] value of four annuities of salaries and office expenses of the Legation of Costa Rica in Italy which has been put in charge of Mr. Tinoco'.[249]

(pp. 25–30), a section entitled 'Les dettes D'État doivent être contractées et les fonds qui en proviennent utilisées pours les besoins et dans L'intérêt de l'état.' The comments of the arbitrator in the Tinoco case at 168 apply so squarely to that portion of Sack's work that their omission can only have been an oversight.

[244] Above, note 51. [245] *Tinoco Arbitration, AJIL*, 148. [246] Ibid., pp. 161–168.
[247] Ibid., p. 162. [248] Ibid., pp. 167–168. [249] Ibid., p. 165.

The credit line was thus exhausted by cheques payable to individuals associated with Tinoco, at a time when martial law had been imposed in Costa Rica and mob violence made it clear that that the government was about to collapse. Confirming the bank's bad faith in the matter, testimony of a bank agent showed that the retirement of the Tinocos was a 'known positive thing' to the bank when the transactions occurred.[250]

The sole arbitrator was Chief Justice Taft of the US Supreme Court. His finding is interesting in both its substance and the way in which it shows how the seemingly difficult abstract question of 'legitimate public use' can become much clearer upon forensic inspection:

> The whole transaction here was full of irregularities. There was no authority of law, in the first place for making the Royal Bank the depositary of a revolving credit fund. [. . .] The [domestically issued] bills were most informal and did not comply with the requirements of law as to their form, their signature or their registration. The case of the Royal Bank depends not on the mere form of the transaction but on the good faith of the bank in the payment of money for the real use of the Costa Rican Government under the Tinoco régime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country.
>
> The case of the money paid to the brother . . . is much the same. The government book entry charges him with this as a payment for expenses to be incurred in the establishment of a legation in Italy. It includes the salaries and expenses for four years. To pay salaries for four years in advance is a most unusual and absurd course of business. All the circumstances should have advised the Royal Bank that this second draft, too, was for personal and not for legitimate government purposes. It must have known that Jose Joaquin Tinoco in the fall of his brother's government, which was pending, could not expect to represent the Costa Rican Government as its Minister to Italy for four years, and that the reasons given for the payment were a mere pretense.[251]

Apart from the finding of law, this case illustrates, as does *World Duty Free v Kenya* examined below, how circumstantial evidence can prove fraud or other impropriety and trigger a meaningful duty of due diligence on the lender's part. Inconsistency with statutory provisions and extenuating circumstances can indicate that the borrowing was not for public

[250] Ibid., p. 167. [251] Ibid., p. 168.

purposes and was thus to be used for personal enrichment. It is not a case of simple fraud.[252]

Some imply that the *Tinoco* case is a more or less obscure outlier precedent.[253] It may be true in respect of the principle under consideration. But the case has attained virtual canonical status for a different proposition of law, namely, that an unconstitutional change of government does not prohibit a de facto authority from binding a state (also to debt obligations) in international law.[254] That the creditor-friendly holding is treated as Solomonic, and the public use finding dispensable, is untenable, even if predictable. Furthermore, as mentioned above and discussed further below, the idea that public debts will only bind the state if they are raised for a public purpose is far from an obscure proposition in American law – it is central and indeed constitutional.

A final interesting element of the case is that Taft found that a remedy of restitution was available and appropriate for the bank in this instance.[255] Costa Rica had in fact seized property apparently purchased with the funds at issue and sold at a value of $100,000. Taft found that the bank had an equitable right to the proceeds from this sale. However, this aspect of the decision is at odds with the general law relating to recovery in restitution when a transaction is held void for illegality.[256]

3. Bribery or contracts procured through bribery

In the famous Lagergren Award, a Swedish arbitrator refused to enforce a claim by a politically well-connected Argentine businessman who was seeking to enforce an alleged undertaking by the defendant foreign investor that it would pay over large commissions on revenue it generated from public contracts the claimant had helped to set up. The arbitrator, Lagergren, found the contract at issue –a contract whose essential consideration was bribery – was a violation of public morals and therefore (in a much contested aspect of the award) outside his jurisdiction as arbitrator. The case was, on a narrow reading, about enforcing a contract whose very essence was illegal.[257] But what of the

[252] Gelpern, 'What Iraq and Argentina Might Learn from Each Other', 411, says it 'essentially' was about fraud. It is not 'fraud' in the sense of one party duping another at the time of contracting.

[253] Buchheit and Gulati, 'Odious Debt and Nation Building', 482; see also Gelpern, 'What Iraq and Argentina Might Learn from Each Other', 406.

[254] See chapter 2, section II.B. [255] *Tinoco Arbitration, AJIL*, 169.

[256] See chapter 4, section III.A. See also Paulus, 'Odious Debts vs. Debt Trap', 100.

[257] J Webb Yackee, 'Investment Treaties and Investor Corruption: An Emerging Defense for Host States?' (2011–12) 53 Virginia J Int'l L 723, 727–729.

more common scenario in which otherwise unobjectionable contracts are procured through bribery or similar forms of corruption?

Just such a scenario was at issue in *World Duty Free Company Ltd. v The Republic of Kenya.*[258] The case involved an arbitration claim brought by Word Duty Free (WDF) in respect of Kenya's effective expropriation of the company without compensation. The claimant contracted with the president of Kenya, Daniel arap Moi, to obtain licenses to operate and equip certain duty-free complexes at Nairobi and Mombasa airports. The complexes were opened in 1990.[259] In 1992, however, President Moi placed further pressure on the company to participate in an illegal and fraudulent scheme that would have allowed the president to defraud the state of US$438 million, to be claimed by an agent company from the Kenyan state in the form of export credits for transactions that never occurred.[260] When the company refused to participate in this transaction and offered to give evidence in a criminal prosecution against Mr. Moi's emissary (Mr. Pattni), the latter arranged to take legal control of the company, and not to restore WDF's property and contractual rights until it agreed to withhold evidence.[261]

WDF brought its breach of contract claim to arbitration pursuant to the agreement, but Kenya, counter-claimed, arguing that the contracts were procured by means of a US$2 million bribe to the (former) president. As such, it claimed, it was a breach of international, English and Kenyan public policy and was therefore a voidable contract that Kenya had taken proper steps to avoid.[262] It was accepted by both parties that the claimant had made a 'personal donation' in that amount to the president, by presenting him with a suitcase full of cash at a meeting between them, and to have it returned to him full of fresh corn leaves.[263] The claimant responded that this formed part of a local system of custom ('Harambee'), and that in Kenyan practice, a donation of this type 'was not only acceptable, but fashionable'.[264]

The Tribunal made three principal findings, in the course of applying the chosen law (i.e. English, Kenyan and international law). First, it found that the 'donation' was a bribe notwithstanding any local practice suggesting that it was consistent with domestic public policy. It noted that

[258] *World Duty Free Company Ltd v The Republic of Kenya* (ICSID Case No ARB/00/7) Award, 4 October 2006.
[259] Ibid., [67]. [260] Ibid., [68]. [261] Ibid., [69–73]. [262] Ibid., [105–109].
[263] Ibid., [130] (statement of Mr. Ali). The cash amounted to US$500,000 drawn against a US$2 million letter of credit.
[264] Ibid., [120].

the concept of Harambee had been abused[265] and that it was (a) probably not, in Kenyan law and custom, inclusive of bribery, and (b) even if it were, would still likely be regarded as a breach of transnational public policy.[266] Further, it was clear from one of the company's statements that its agent was uncomfortable about the arrangement, and that he knew that he had to pay the money in order to obtain the contract.[267] Second, the Tribunal explicitly rejected the submission that it must accept that the legal personality of the head of state and the state itself were one in the same, so much that any knowledge of the president was attributable to the state of Kenya. It thus refused to accept that the president could borrow Louis XIV's infamous claim that 'he *was* the state.'[268] Third, the Tribunal found that bribery constituted a breach of international public policy, as well as English and Kenyan public policy. The concept of 'international' public policy meant 'transnational' public policy, a breach of the policy concerns of all or most states.[269] After reviewing a number of authorities, including various Tribunal decisions, decisions of national courts, and international conventions and declarations, the Tribunal concluded thus:

> In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to international public policy of most, if not all, States, or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal.[270]

It went on to find a similar prohibition in English and Kenyan law. The basic position in both legal systems is that the legal maxims of *ex dolo malo non oritur actio* and *ex turpi causa non oritur actio* stand for the principle that one cannot found a cause of action on an immoral or illegal act.

Although the *World Duty Free* case appears to be one of the first modern published arbitral awards to squarely find that contracts procured through bribery are unenforceable as a matter of public policy, others soon followed afterwards within the context of arbitrations under

[265] Ibid., [134].
[266] Ibid., [170], [172]. On the concept of transnational public policy, see chapter 4, section I.
[267] Ibid., [135]–[136]. [268] Ibid., [185].
[269] Ibid., [141]–[142]. The tribunal is at pains, at [138]ff., to distinguish this idea from the international public policy occasionally used in reference to Article V2 of the New York Convention on the Recognition and Enforcement of Foreign Judgments and Awards.
[270] Ibid., [157]. See also [140]–[147].

Bilateral Investment Treaties (BITs).[271] In *Inceysa Vallisoletana S.L. v Republic of El Salvador*, the Tribunal found that the investor obtained a concession for building vehicle testing stations by defrauding the state during the public bidding process; it had submitted false financial documentation, misrepresented its qualifications, and concealed its relationship with another bidder.[272] The Tribunal found that Inceyesa's actions were clearly illegal, and thus not 'in accordance with law' and therefore excluded from the BIT's protection. It found that actions were in violation of the principle of good faith, a host of legal and equitable maximums such as *ex dolo malo non oritur actio*, international public policy and also, interestingly, that to allow the claim to go forward would give rise to an unjust enrichment.[273] The Tribunal found that this illegality deprived the Tribunal of jurisdiction under the BIT. The case of *Plama Consortium Ltd v Republic of Bulgaria* similarly involved fraud in the bidding process, where an investor falsely claimed to be acting in a consortium with other commercial entities when it made its bid to take over an oil refinery.[274] After winning the bid, Plama's operation foundered and landed in bankruptcy proceedings. The Tribunal ruled that the issue was a question of merits rather than admissibility, and continued to find that the investment was obtained by fraud and that to give effect to it 'would be contrary to the basic notion of international public policy – that a contract obtained by wrongful means (fraudulent misrepresentation) should not be enforced by a tribunal'.[275] In *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, a majority of the Tribunal found the investor to have 'consciously, intentionally and covertly structur[ed] its investment in a way which it knew to be a violation' of the Philippine Anti-Dummy Law.[276] It declined jurisdiction and thus found the claim unenforceable.

These cases raise an important issue in the law of arbitration, namely, whether a claim that a contract is illegal/against public policy under applicable law is an issue going to the jurisdiction of the Tribunal, rather than to the admissibility of a particular claim. It arises as an issue presumably because the claim may be that corruption vitiates the arbitration agreement as well as the substantive agreement. The distinction may appear unimportant in the cases examined above, since either way

[271] As noted by Webb Jackee, 'Investor Treatises and Investor Corruption', 729, most arbitral awards were private and unpublished.
[272] (ICSID Case No ARB/03/26) Award, 2 August 2006, [236]. [273] Ibid., [230]–[257].
[274] (ICSID Case N. ARB/03/24) Award, 27 August 2008. [275] Ibid., [143].
[276] (ICSID Case No. ARB/03/25) Award, 16 August 2007 [323].

the Tribunal finds the claim unenforceable. Yet by contrast with national courts and the ICJ, the distinction is exceptionally important, because as Jan Paulsson explains 'the dominant feature of arbitration is that jurisdictional decisions are reviewable [by courts], but not others'.[277] The consequences may thus be important for the finality of the determination. Be that as it may, the key point in the present chapter is that corruption debts are now clearly acknowledged as being contrary to international public policy, which is recognised and enforced by arbitral tribunals who apply international law to commercial transactions involving sovereign states.

V. Dispute Settlement and Unilateral Repudiation

Commentators, including Sack, have worried that any doctrine of odious debt would be used opportunistically by states.[278] Such fears are perhaps borne out in the German use of the doctrine in Austria, perhaps by America with the Cuban loans, as well as recent debt rescheduling in Argentina and Ecuador. It is therefore necessary to consider whether unilateral repudiation would be consistent with international law. Sack believed that the debtor bore an obligation to raise any such odious debt claims before a tribunal.[279] However he never clarified this position in law. In fact it is generally recognised that there is no formal obligation to engage in international adjudication for the peaceful resolution of international disputes; to the contrary, the judicial settlement of disputes has been exceptional.[280] This means that, absent special circumstances, a bilateral or multilateral dispute between states does not oblige any state to arbitrate or litigate.

However, this general rule seems to be of limited relevance for two reasons. The first is that in loan agreements with private persons, even assuming such a dispute is governed solely by international law (itself rare), a repudiation is likely to be treated as an expropriation of contractual rights (see chapter 2, section II.B). It is also settled law that a denial of

[277] J Paulsson, 'Jurisdiction and Admissibility' in G Asken et al (eds.), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005), pp. 601, 603.

[278] See FCR Despagnet, *Cours de droit international public*, 4th edition (Paris: L Larose et L Tenin, 1910), p. 125; A Cavaglieri 'Regles générales du droit de la paix' (1929) 26 Hague Recueil 315, 381; O'Connell, *State Succession*, p. 459; Gelpern, 'What Iraq and Argentina Might Learn from Each Other', 403.

[279] Sack, *Les effets des transformations des États*, p. 163.

[280] Crawford, *Brownlie's Public International Law*, p. 718 & ch. 32 generally.

justice itself gives rise to state responsibility. A denial of justice was defined, in general terms, by a NAFTA tribunal as occurring where 'the relevant courts refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way'.[281] There can be no doubt that a state's unilateral repudiation on the basis of an asserted legal right, without the benefit of legal process (if insisted upon), would violate this standard. If adequate compensation is not paid, the state must at the very least offer due process within its own courts (and since that process itself ma in many cases risk being a denial of justice on substantive grounds, it would be safer to choose international arbitration).

The second reason is that it is likely that even loans concerning bilateral or multilateral relations between states will have choice of law and forum provisions. For example, the standard terms and conditions for loan agreements with the World Bank, for instance, specify binding arbitration as a method for dispute resolution.[282] Bilateral loan agreements may have provisions relating to dispute resolution, however not all do.[283] Yet where they do not, and granted that some do, it must be a strategic choice exercised by states on the assumption that diplomatic channels are sufficient for working through any dispute.

VI. Summary and Conclusion on Odious Debts in International Law

Given the breadth of territory covered in this chapter, it will be helpful to summarise the principal conclusions on whether states are bound to recognise odious debts under international law. Each will be considered in turn. War debts have traditionally been defined as debts arising out of transactions which helped or are presumed to have helped the defeated country in waging or preparing war against the successor state or its allies. There is ample state practice, doctrinal agreement, and some principles of law that show these are unenforceable in cases of state succession. There is no clear state practice in relation to changes of

[281] *Azinian v United Mexican States* (1999) 121 *ILR* 1, 23–24 (NAFTA Tribunal); approved in *Mondev v United States of America* (2002) 125 *ILR* 98, 151 (NAFTA Chapter 2 Arbitration).

[282] JW Head, 'Evolution of the Governing Law for Loan Agreements of the World Bank and Other Multilateral Development Banks' (1996) 90 *AJIL* 214, 219–220.

[283] For numerous examples, see the UK Foreign and Commonwealth Office's treaty database <http://treaties.fco.gov.uk/treaties/treaty.htm>, accessed 22 July 2015, and the US Department of State's 'Treaties in Force' database <www.state.gov/s/l/treaty/tif/index.htm>, accessed 22 July 2015.

government only, though state practice in America suggests that debts related to armed rebellions will not be recognised. Where the war was illegal in international law – that is it violates the prohibition on the use of force – then general principles of international law and *jus cogens* norms would suggest the debt is unenforceable. Though the principle is compelling, examples in practice are difficult to find.

Subjugation debts are those debts that are made for the purpose of facilitating the violation of jus cogens norms, commission of serious or flagrant violations of human rights, humanitarian law or other fundamental international law principles in respect of the population of the debtor state. Subjugation debts were traditionally defined as those whose purpose is actively hostile to the major interests of the population of the debtor state. There is a line of precedents in the law of state succession where debts of this nature have not been apportioned or recognised, and a substantial number of writers support the idea that such debts are not enforceable in that context. There are far fewer precedents in cases concerning a change of government only, and these are more disputed. However, modern international law, which recognises the non-derogable nature of peremptory or *jus cogens* norms, requires that international agreements that conflict with such norms are void. These peremptory norms, as well as the notion of serious or grave breaches of international human rights, humanitarian or similarly fundamental norms of international law, fit and accurately describe the types of situations deemed odious by the early writers on odious debt. They represent a continuity of that tradition, though in a form now spelled out in law. Therefore, when odious debts are defined by reference to breaches of *jus cogens* and other similarly fundamental norms, their unenforceability flows from the legal position of the international norms themselves. It flows from the proposition that a transaction whose purpose is to frustrate fundamental norms of international law cannot rely on international law to obtain enforcement. Thus, subjugation debts would not be enforceable in international law regardless whether the debt pertains to state succession or a change of government.

Illegal occupation debts are those contracted by a power that occupies the territory of another state and which purport to be in the name of the occupied state. These debts by definition arise only in cases of state succession or that of belligerent occupation. In such cases, there is a presumption that the debt does not bind, as confirmed in practice and in legal writing. Corruption debts relate to those loan agreements knowingly procured without lawful authority on the borrower's part,

through bribery, or for the personal enrichment of public officials (indirect bribery) rather than bona fide public use. Such debts violate general principles of international law, and transnational public policy as evidenced in a range of international conventions and now confirmed in arbitral decisions. They are not enforceable in cases of state succession or where there has been a change of government. Indeed, they are not enforceable at all at any time, even personally against the corrupt official who agreed the contract.